

GLOBALIZING PROPERTY

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ABSTRACT

Property is more than domestic. It is international, transnational, and global. Its reach, its consequences, and its ideas can rarely be theorized effectively or contained entirely within national borders. It is produced through encounters between actors from multiple jurisdictions, and by law from multiple sources. It is not stable or static. It is contested and ever evolving. Common law property is not neutral or ahistoric. It was formed in particular moments, and it benefits particular constellations of power.

Beginning with a history of several significant moments of property-related conflicts between foreign property claimants and domestic property holders, the Article puts forward the argument that these conflictual encounters constitute the basis for the formation of common law property thought as understood today. The development of property thought is then traced not as a linear trajectory without regard to the concrete historical and geographical circumstances, but rather as operating in the midst of different phases of socio-economic transformation. In examining that genealogy, and in placing property doctrine in a globalized sociological and political economic context, this Article attempts to reveal how the current moment of financial capitalism has mobilized a significant ceding of sovereignty and accountability to private actors through—often taken-for-granted—common law property regimes.

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Given property law's ambivalent position between a constitutional right and a core token in private regulatory governance, a study of 'transnational property' invites two related reflections. First, that property, when studied from a transnational perspective, is a norm which is constantly operationalized, fought over, and stipulated against a background of shifting sovereignty claims between public actors and private agents. Second, property law, in its historical and geographical formation, has always been both transnational and 'hybrid.' It must be appreciated against the background of historical contingency, involving past and present assertions of might and superiority and resulting in disturbing patterns of legal export, transplant, and intervention. A fresh look at the transnational origins and dimensions of property law today furthermore promises to shed new light on the effect that property law has had on differently situated stakeholders and reveals how transnational property legal regimes continue to be sites of conflict and struggle.

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*"Rational concern for the production and sharing of wealth and other values either in the United States or in other countries cannot today stop short with the political boundaries of the contemporary nation-state."*¹

Myres McDougal

David Haber

*"How far can law still be thought of in terms of distinct systems when new or newly important forms of powerful, authoritative regulation are created outside – or at least are not limited within – the jurisdictions of nation-states . . . ? How far is it becoming realistic to think of law in terms of diverse, intersecting, interacting networks of regulation rather than self-contained systems?"*²

Roger Cotterrell

¹ See MYRES MCDUGAL & DAVID HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT: SELECTED CASES AND OTHER MATERIALS ON THE LAW OF REAL PROPERTY: AN INTRODUCTION 1156 (1948) [hereinafter MCDUGAL & HABER].

² See ROGER COTTERRELL, SOCIOLOGICAL JURISPRUDENCE: JURISTIC THOUGHT AND SOCIAL INQUIRY (2017).

1. PROPERTY LAW, TRANSNATIONAL: LAW OUT OF CONFLICT

The first quote above from American legal scholars Myres McDougal and David Haber is from their property law textbook, published in 1948 when they were professors at Yale Law School.³ The second quote, from English legal scholar Roger Cotterrell, is from a monograph published just shy of seventy years later. That resources and the law that governs them are globalized and not “self-contained” evidently still needs to be argued explicitly.

This Article traces the idea of property law—the law that governs resources—as a product of globalized legal thought, practice, and encounters. While the approach to a distinctly globalized framing of property appears to be of recent emergence, this Article starts from the premise that current common law conceptions of property and doctrinal frameworks are *by definition* transnational, which, as a first matter, implies that they were largely formed as a result of encounters⁴ between domestic and foreign actors. In that regard, the proposition made here is that laws and norms that inform current debates over cross-border claims to property—including foreign acquisition of agricultural land (land grabs),⁵ the control of natural resources,⁶ or investor-state dispute

³ MCDUGAL & HABER, *supra* note 1.

⁴ On the idea of “encounter” as international law-producing, see Sundhya Pahuja, *Laws Of Encounter: A Jurisdictional Account Of International Law*, 1 LONDON REV. INT’L L. 63 (2013) (describing international law as a law of encounter and showing how the actualization of the state is an ongoing project of international law.).

⁵ See, e.g., Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT’L L. 101 (2013); LORENZO COTULA, *THE GREAT AFRICAN LAND GRAB?: AGRICULTURAL INVESTMENTS AND THE GLOBAL FOOD SYSTEM* (2013).

⁶ For literature surrounding the often-referenced compendium of mining companies and the control of natural resources, see ROGER MOODY, *THE GULLIVER FILE: MINES, PEOPLE, AND LAND: A GLOBAL BATTLEGROUND* (1992); Anthony Bebbington, *The New Extraction: Rewriting the Political Ecology of the Andes?*, in 49 NACLA REPORT ON THE AMERICAS 12-20 (2009); Al Gedick, *Resource Wars against Native People in Colombia*, 54 CAPITALISM, NATURE, SOCIALISM 85 (2003); Todd Gordon & Jeffery R. Webber, *Imperialism and Resistance: Canadian Mining Companies in Latin America*, 29 THIRD WORLD Q. 63 (2008); Sundhya Pahuja, *Conserving the World’s Resources?*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 388-420 (James Crawford & Martti Koskeniemi eds., 2012).

settlement (ISDS)⁷ — must be studied against a complex global historical and geopolitical background.

In other words, a starting assertion of the following analysis is that property law and thought are ever-evolving and involve a *global* set of actors and ideas.⁸ Admittedly, to some readers who intuitively engage with all law as operating in a global context, this argument will seem fairly obvious, albeit under-explored in current property law literature. To others, however, it will likely not. Many American property law casebooks treat property law as nearly entirely constituted through domestic legal processes and substantive law.⁹ Coverage of topics such as takings, trespass, racial

⁷ See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2008) [hereinafter VAN HARTEN 2008]; M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015).

⁸ See JOHN G. SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY (2014) (describing the origins and evolution of property rights developed in the international). On the challenges that globalization presents for domestic property regimes, see AMNON LEHAVI, PROPERTY LAW IN A GLOBALIZING WORLD (2019) (examining various doctrinal areas in property and “strategies” to adapt to cross-border activities). On property rights of states under public international law, see Peter Tzeng, *The State's Right to Property Under International Law*, 125 YALE L.J. 1805 (2015) (describing States rights and international controversies concerning property rights under international law).

⁹ See, e.g., JESSE DUKEMINIER ET AL., PROPERTY (7th ed. 2010); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2d ed. 2012); JOHN G. SPRANKLING, & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH (4th ed. 2018). This is not to say that there are not any comparative references to doctrine or scholarship from outside the United States. Merrill and Smith, for example, have a number of comparisons throughout the text. However, the concern that this Article seeks to address is that it remains under-appreciated that American, and other systems, property doctrines and thought are *constituted* through their global context.

This is also not to argue that the authors themselves see property this way. For example, casebook author John Sprankling has several projects on property under public international law, and Gregory Alexander has engaged in a number of comparative law projects. See JOHN G. SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY (2014); JOHN G. SPRANKLING, RAYMOND R. COLETTA, & M.C. MIROW, GLOBAL ISSUES IN PROPERTY LAW (2006); GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006); Gregory S. Alexander, *Comparing the Two Legal Realisms – American and Scandinavian*, 50 AM. J. COMP. L. 131 (2002).

Rather, the lack of engagement that this Article wishes to draw attention to in first-year casebooks only underscores the power of the belief that first-year law students should learn the “law” of property, which would not include global influences, events, theory, or doctrine.

discrimination, land use, and foreclosure, for example, include little reference to legal thought and practice outside of national boundaries or of global influences or events.¹⁰

The exception may be limited references to English common law and thought (and the rare mention of Roman law), but even those generally portray the constitution of property doctrine as a linear one-way process—with new Americans instituting their own variations on what they wanted to adapt from original English common law (for example, ridding themselves of the fee tail or in their treatment of equity), rather than an ongoing dialogue and constitution. Even treatments of *Johnson v. M'Intosh*—by its nature a transnational case (as discussed in Part II), generally do not engage with the idea of American Empire, or even of the case as an account of encounter between two sovereign powers.

¹⁰ Alternatively, seeing property in global contexts could mean the following: Takings law could include discussion on the influence of foreign investors and foreign investment law. See discussion *infra* Part II. It should be noted here that MERRILL & SMITH, *supra* note 9, at 1211-18, does include a brief discussion of government forbearance in the context of Foreign Investment Treaties.

A trespass case often used in casebooks, *State v. Shack*, involved migrant workers living on the farm on which they worked and denied access to aid workers by their employer. See *State v. Shack*, 277 A.2d 369 (N.J. 1971). The geopolitical context in which they ended up working and living on the farm of an authoritarian employer is significant in understanding the New Jersey aid program at issue and the precarious situation of the workers. See *id.*

Desegregation has its own history of foreign relations and international pressure rarely found in first-year curricula. *Shelley v. Kraemer*, the 1948 Supreme Court case that prohibited racially restrictive covenants in property sales had an amicus curiae brief *on behalf of the United States* which had the following quote from then-Acting Secretary of State Dean Acheson:

“The existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. . . . Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries

An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.”

See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STANFORD L. REV. 61, 101 (1988) (quoting Brief for the United States as Amicus Curiae at 19-20, *Shelley v. Kraemer*, 334 U.S. 1 (1948)). Derrick Bell famously termed the Cold War pressure to desegregate that resulted in cases such as *Brown v. Board of Education* “[i]nterest-[c]onvergence” between white people and black people. See Derrick A. Bell, Jr., *Brown v. Bd. of Educ. and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

The transnational context of how property law came to be is all but ignored. The political pressure on the framers of the U.S. Constitution to conform with other common law constitutions¹¹ centuries ago is invisibilized. The Cold War pressures to end the most obvious forms of legal racial discrimination are not addressed. The increased presence and power of foreign investors exercising influence on property as well as property law does not appear. This Article's primary goal is to speak against the grain of that powerful orthodoxy of strict domestically-informed analysis.

The orientation offered here situates property law doctrine in a wide context of state formation, colonialism, development, as well as foreign direct investment. Similar to concurring research in company¹² or commercial law,¹³ the central interest here is to identify methods of analyzing property which bring those sociological and political-economic contexts more directly into legal discourse.

In situating property in global context, the following here reveals the opacity of private power in governance of and around property. In doing so, it draws first from Legal Realism and its progeny. However, both the nature of property ownership as well as the legal and regulatory webs around property have changed dramatically since the time of their writing in the first half of the twentieth century as the global economy has become increasingly financialized. First, the nature of global financial flows and related

Land use treatments could include pressures that local governments face to exercise their power to zone in favor of foreign investors and their local activities. Finally, discussion of the foreclosure crisis could include accounts of how it was inherently global in nature because of the nature of investment in U.S. mortgage-backed securities, the global adoption of U.S. forms of real estate-related financial instruments.

¹¹ See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830* 5-6 (2005) (stating that "Overseas, provincial New Yorkers successfully used those components of common-law constitutionalism upholding local autonomy, which forced the imperial agents to search for a separate imperial law. But the agents' attempts to create it helped precipitate rebellion, and today they are forgotten.").

¹² See, e.g., Paddy Ireland, *Company Law and the Myth of Shareholder Ownership*, 62 MODERN L. REV. 32 (1999).

¹³ See generally ROY GOODE, HERBERT KRONKE, & EWAN MCKENDRICK, *TRANSNATIONAL COMMERCIAL LAW: TEXT, CASES AND MATERIALS* (2nd ed. 2015); Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in 2 *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 19-31 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

claims of property ownership (and therefore, as will be explored, of governance) across jurisdictional borders stretch the market-oriented power analyses of Realists past their limits.

Second, the spatial disruption of jurisdictional borders more generally—from those that govern intellectual property, to those that govern online activities, to those which determine tax liabilities—call for a revision of place-based notions of property ownership.

Third, compounding that disruption of spatial jurisdictional borders is the increasing blurring of legal fields as property-related phenomena such as, international real estate markets, rest on regulatory webs of finance, land use, property ownership, and immigration, to name a few.

Finally, the ongoing legacy of conquest and colonial encounters—as manifested in, for example, indigenous claims over territory, uneven bargaining power in the World Trade Organization, or international pressure on Global South countries to enact or refrain from enacting certain regulatory regimes—calls for a retelling of how taken-for-granted doctrines in common law property (such as expropriation) came to be.

Many of the property doctrines that are apparently taken for granted and exported or imposed through economic development efforts and other forms of international politics and law are treated as if they are neutral or scientific-like principles not in need of social or historical contextualization. Indeed, one leading American property casebook declares,

With a tip of the hat to Hayek, we can call the older property rights in land and personal property that have been around for so long no one remembers how they got started “spontaneous” or “grown” orders of property rights, and the newer, deliberately created schemes “made” orders of property rights.¹⁴

This Article seeks to remind us, if not of the precise events, then at least of the constellations of power through which enduring notions in property “got started” and through which they are perpetuated. This requires engaging with both the histories of

¹⁴ MERRILL & SMITH, *supra* note 9, at 1107, citing 1 F.A. HAYEK, LAW LEGISLATION, AND LIBERTY: RULES AND ORDER 35-54 (1973).

property doctrines (Part II) and new methodologies (Part III). By putting the insights of Legal Realists and their legal pluralist progeny in conversation with indigenous legal and postcolonial legal theory as well as urban sociology and legal geography, this Article aims to show how (i) common law property thought has a long history of formation as a result of encounters with other systems of law and norms, and (ii) that understanding property in this sociological, political-economic, and historic context has significant implications for how common law property is employed today, namely with respect to unsettling assumptions around who gets to use property, who gets to determine the rights associated with that use, and what purposes property regimes should serve. Said differently, this Article attempts to further the Legal Realist project of revealing law as a constellation of non-neutral, political choices that must be understood in societal contexts and postcolonial legal theory's commitment to unsettling dominant legal orthodoxies by retelling their colonial histories, tracing those ongoing legacies, and showing the ever-evolving global context of common law property doctrine and thought, its historical contingencies and contradictions, and its political formations and distributional consequences.

Roger Cotterrell, whose insight as to the spatial disruption of regulatory regimes opened this Article, captures the motivation for an expanded frame of analysis as follows:

[J]urisprudence needs new resources. It must take full account of the social and political contexts in which problems about system, authority and plurality arise if it is to adapt to address effectively the developing transnational and international dimensions of law . . . Law's authority has long been parasitic on the political authority of the state, legitimated by democratic processes.¹⁵

But, as he notes, in the current world and state of law, "this may no longer be sufficient."¹⁶ What is needed, therefore, is "to consider more carefully how authority can arise and the various forms it can take."¹⁷ He advocates, therefore, for a sociologically-informed

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

jurisprudence, which would “reveal[] authority being created in patterns of social interaction not necessarily regulated or supervised the state and often unknown to or ignored or misunderstood by state officials and jurists.”¹⁸

These questions resonate with property law-related inquiries. Whether the question is of title claims in the settler-colonial context,¹⁹ the threatened extinction of community uses of land as a consequence of a resource extraction license,²⁰ or the eviction of ‘illegal’ long-time squatters from the pavement under the auspices of ‘urban renewal,’ ‘modernization,’ and ‘beautification,’²¹ property law claims carry in themselves a range of conflicting rights, but in fact more, namely an entire universe of political-normative claims regarding the desired social (and economic) order.²² Seeing the plurality—as well as the permeability—of property and relatedly, the diverse sites of authority to govern it invites re-thinking of even entrenched property doctrines toward enable more equitable distribution and access.

A word of clarification concerning the use of the term ‘transnational’ and its multi-dimensional meaning: this Article takes as a starting point the term as it is often used to demarcate the global interactions of private actors, whether in the domains of *lex mercatoria*, through social movements, or in other constellations as they occur on across jurisdictional borders.²³ It also engages with the idea of the ‘transnational’ more specifically as it refers to the overlapping jurisdiction of laws occupying different, often

¹⁸ *Id.*

¹⁹ See, e.g., LARISSA BEHRENDT, *ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA’S FUTURE* (2003); John Borrows, *Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia*, 37 OSGOODE HALL L.J. 537 (1999); Douglas C. Harris, *Property and Sovereignty: An Indian Reserve and a Canadian City*, 50 U.B.C. L. REV. 321 (2017).

²⁰ See POOJA PARMAR, *INDIGENEITY AND LEGAL PLURALISM IN INDIA: CLAIMS, HISTORIES, MEANINGS* (2015).

²¹ See *Okhla Factory Owners Ass’n v. Gov’t of Nat’l Capital Territory of Delhi*, (2002) 108 DLT 517 (Delhi HC); Priya S. Gupta, *Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India*, 42 FORDHAM URB. L.J. 25 (2014).

²² On the plural purposes of property, in particular its value as a social institution, see JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010).

²³ See PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); Peer Zumbansen, *Transnational Law, Evolving*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898-925 (Jan M. Smits ed., 2nd ed. 2012).

sometimes competing regulatory spaces²⁴ and as it is applied to the tension between jurisdictional and spatial demarcations.²⁵ In that sense, transnational law is treated here as a *method*, rather than a *field* of law.²⁶ While the latter would imply a “distinct regulatory purpose and a particular set of doctrinal rules and principles”,²⁷ the former conceives of transnational law as a means of studying the evolution of legal actors, norms, and processes in a global context:

[T]ransnational law is at once a legal-theoretical, methodological framework through which processes and actors of legal norm generation are scrutinized in local and global contexts . . . while it is also a critical project that seeks to understand the conditions under which invocations of ‘law’ are made, contested and resisted. This intersection of a *theory* of transnational norm making with a *critique* of law and rights in a global context is at the heart of transnational law and thus reveals its affinities with areas, where scholars increasingly turn their attention to questions of ‘sources’ of law, to the actual processes of norm generation and norm contestation and to the wide variety of actors involved.²⁸

²⁴ For example, while company law and labor law are both fields which in reality relate to an integrated corporate environment, doctrinally they are treated separately. For an in-depth discussion of this fragmentation and overlap, see generally Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance*, in PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff eds., 2012).

²⁵ For example, the demarcations of national jurisdictions that attempt to regulate online content, versus the reality of the Internet’s existence in a space that defies those very borders.

²⁶ See Peer Zumbansen, *Transnational Law: Theories and Applications*, in THE OXFORD HANDBOOK ON TRANSNATIONAL LAW (Peer Zumbansen, ed., forthcoming) [hereafter Zumbansen, *Introduction*].

²⁷ Peer Zumbansen, *The Continuing Search for Law in a Globally Interconnected World: Engaging and Contextualizing Jessup’s ‘Transnational Law,’* in JESSUP’S BOLD PROPOSAL. CRITICAL ENGAGEMENTS WITH ‘TRANSNATIONAL LAW’ at 42 (Peer Zumbansen ed., 2020).

²⁸ See Peer Zumbansen, *The Continuing Search for Law in a Globally Interconnected World: Engaging and Contextualizing Jessup’s ‘Transnational Law,’* in JESSUP’S BOLD PROPOSAL. CRITICAL ENGAGEMENTS WITH ‘TRANSNATIONAL LAW’ at 34 (Peer Zumbansen ed., 2020); see also Peer Zumbansen, *What Lies Before, Behind and Beneath a Case? Five Minutes on Transnational Lawyering and the Consequences for Legal Education*, in STATELESS LAW: EVOLVING BOUNDARIES OF A DISCIPLINE (Helge Dedek & Shauna Van Praagh eds., 2016).

In understanding transnational law as a method and in engaging with research questions around norm formation and contestation, two further dimensions of research orientation become clearer: that an interdisciplinary framework is necessary to appreciate historical, political, and social contexts that create law; and that doctrinal areas are not as easy to separate as they may first appear—emerging regulatory regimes cross numerous doctrinal areas and do not easily lend themselves to a unified conceptualization.²⁹

With that in mind, to “globalize” or “transnationalize” property involves the simultaneous treatment of multiple several critical and disciplinary investigations. First, the doctrinal frames of property law are reassessed in terms of how boundaries are created between property law and concurring regulatory areas such as contract law, constitutional law, and investment law. That investigation further reveals the embeddedness of each of these frameworks in both implicit and explicit assumptions regarding the prevailing socio-economic and political order as a whole.³⁰ Second, from this follows that one is confronted not with just one, however conceptually coherent ‘liberal’ theory of property (and a concurring historical narrative to provide the necessary factual evidence), but—instead—with a host of, in themselves, distinct as well as overlapping genealogies of transnational property law development.

Third, this Article will focus primarily on property rights related to land to illustrate how even a certain type of property that appears to be rooted *in* and bound *to* a particular, jurisdictionally specific place (*immovable* property),³¹ is nevertheless entangled in the

²⁹ See *infra* Part III’s discussion of legal pluralism; see also Carrie Menkel-Meadow, *Why and How to Study Transnational Law*, 1 U.C. IRVINE L. REV. 97 (2011); Terence Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3, 42-44 (Terence Halliday & Gregory Shaffer eds., 2015); Zumbansen, *Introduction*, *supra* note 26.

³⁰ For an elaboration of the idea of relating doctrinal frameworks to the political economy in which they are operating and invoked, see Zumbansen, *Introduction*, *supra* note 26.

For significant political economic analyses of property law and thought, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1998); FRANK K. UPHAM, *THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES* (2018); see also EDWARD P. THOMPSON, *WHIGS AND HUNTERS* (1975).

³¹ On the tensions wrought by the representation of land on paper from memory and maps to contract to title and records, see Alain Pottage, *The Measure of*

evolution of competing global property regimes. The following investigation will furthermore show how, in relation to land, what aspects—material and cultural—are captured by a concept of ‘property law,’ which rights and obligations are tied up in the notion and principle of ownership, and how in each the struggle over—and evolution of—diverting justifications for those rights is found.

Fourth and finally, in using the idea of long-standing and overlapping genealogies of property claims in a transnational, border-crossing context, and in employing an interdisciplinary method of analysis, this Article shows how dominant ideas in property continue to emerge in various historically-contingent circumstances and then are exported and adapted through time and place. With that understanding, it offers an analytical method of moving outside of dominant frames of understanding property law and seeing its plurality and its operation ‘on the ground.’ These dynamics are traced through colonial, economic development, and international political, legal, and investment encounters into the present day and its complex struggles over political and economic equality, environmental sustainability and cultural recognition—all of which appear to be caught up in disputes over ‘property.’³² The aim here is not to generalize all of property as part of one story or system, but rather to decenter an account of how one constellation of property regimes—that of common law property—in order to demonstrate how it has been shaped by multiple encounters of actors across jurisdictional borders and the normative-regulatory regimes that grew out of these encounters.

The critical account provided here is primarily one of common law.³³ This is justified in light of the many ways in which the

Land, 57 THE MODERN L. REV. 361, 362 (1994) (exploring that transformation of representation, which the author argues “reduc[ed] the dimensions of juridical ownership to paper” through contract, and with the subsequent introduction of title and registration, “rendered property and topography commensurable, reducing each to a form of notation which could be accommodated to or superimposed upon the other”).

³² See, e.g., POOJA PARMAR, INDIGENEITY AND LEGAL PLURALISM IN INDIA: CLAIMS, HISTORIES, MEANINGS (2015); VANDANA SHIVA, BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE (1997).

³³ A truly transnational view of property should engage more deeply with Asian and civil law property regimes, those of the former U.S.S.R., indigenous laws, and other common, civil, and other legal regimes in Latin America and Africa.

common law of property continues to be promulgated by international financial institutions and other powerful international actors in both international and domestic regimes,³⁴ and also with regard to common law property thought's claim to an almost ahistorical prominence.³⁵

Part II puts this argument in historical context. It opens with a brief reflection on the stakes involved in appreciating property in a globalized, transnational context before tracing several foundational moments of the establishment of property theory in history. The dynamic of transnational property can be traced back centuries – from Roman law³⁶ to conquest and colonialism and more recently to development and investment regimes, as they unfold against an intricate multiplication of interests and issues. Given the sprawling nature of this task, one can only point to a number of representative instances in such a timeline. The modest aim here, rather than following the thread through each particular reference point, is instead to argue for reorientation of our perception. In other words, this Article will attempt to shift our gaze to the plurality of evolutionary thread(s), as they form the background for each concrete encounter with “property.” This, this Article will do by singling out three landmark but also *ongoing moments* of property encounters and lawmaking: conquest, colonialism & development, and international investment.

In search of a better grasp of the nature of the evolving property law regimes in a transnational context, particular emphasis is placed on the way in which often violent encounters between certain actors are the outset of newly formulated as well as rejected property law

Limitations of scope and expertise have limited this Chapter primarily to common law regimes in the United States, Canada, Australia, and India, and to influences found in transnational law. It is this author's hope that future projects can engage with a wider variety of legal traditions.

³⁴ See, e.g., David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 ACCOUNTING, ECON. & L. 1 (2011); Monica Eppinger, *Property and Political Community: Democracy, Oligarchy, and the Case of Ukraine*, 47 GEO. WASH. INT'L L. REV. 825 (2015); Rashmi Dyal-Chand, *Exporting The Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59 (2007).

³⁵ See, e.g., ALEXANDER 1998, *supra* note 30; PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (2002).

³⁶ See Anna DiRobilant, *The Building Blocks of European Property Law: The Roman Conceptual Vocabulary of Property* (draft paper, on file with author).

rules, norms, and principles. Studying these encounters as sites of law-making highlights the importance of historical facticity and the contingency in the formation of 'property law' and connects this project to concurring efforts in a growing range of areas to study the generation of law making from within concrete sites of conflictual encounter, such as in commercial arbitration and *lex mercatoria*³⁷ as well as alternative dispute resolution.³⁸

Once common law property thought is presented as historically contingent, hybrid, and encompassing a variety of overlapping doctrines, Part III puts the argument in *methodological* context. Drawing on a host of conceptual and analytical frameworks to help in this endeavor—comparative legal analysis, legal geography, legal anthropology, the sociology of law, postcolonial theory, and legal pluralism—it distills four lenses through which it is proposed an analysis of globalized property regimes should be approached: the 'diffusion of law'; the plurality of law and its constituent norms; postcolonial 'everyday lived' experiences of urban property; and law's proliferation in terms of norm creation and norm implementation beyond the state.

The analysis concludes in Part IV by returning to the correlation of sovereignty and property, which has been a well-known staple in critical legal analysis. With the help of the foregoing critique of transnational property law regimes as sites of continuing conflict, one will be able to capture more effectively how the new legal structures arising out of conflictual encounters can be seen to perpetuate the allocation of resources with a 'normalizing' effect, rendering them more immune against critique while precluding more equitable distribution. The power relationships that are encoded in law through these encounters ultimately determine access to property and resources. Our analysis will show that

³⁷ Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L. J. 419 (2000); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL L. STUD. 447 (2007).

³⁸ For various discussions on alternative dispute resolution in different contexts, see, e.g., Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009); Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009); Amy J. Cohen, *The Family, The Market, and ADR*, 2011 J. DISP. RESOL. 91 (2011); Sari M. Graben, *Assessing Stakeholders Participation in Sub-Arctic Co-Management: Administrative Rulemaking and Private Agreements*, 29 WINDSOR YB. ACCESS. JUST. 195 (2011).

property law's normalizing tendencies have detrimental consequences for the way in which societal, racial, class, gender, and other hierarchies are constituted and institutionalized.

2. HISTORY: LANDMARKS, INEQUITIES, AND CONTINUITIES IN PROPERTY REGIMES THROUGH TRANSNATIONAL ENCOUNTERS

Property law regarding land, as it located in particular place, is often theorized within an implied domestic frame.³⁹ Applications of property law usually refer to the local statutes and law as embedded within the larger national jurisdiction, and rarely beyond that to international regimes, or to other jurisdictions.⁴⁰ However, the innumerable instances over centuries of individuals and corporate and other entities crossing borders (and oceans) and laying claims to property belie the simplicity of focusing solely on the domestic jurisdiction of property. It is not just that the domestic jurisdiction adapts by merely recognizing the 'owner' as a foreign entity, but rather that with that claim and negotiation, new forms of jurisdiction⁴¹ are shaped, new ideas around who can rightfully make a claim to what and how, new norms around the meaning of 'ownership,' and what the actual—explicit or implicit—regulatory purpose is of a property regime appear to easily cross boundaries, diffuse, and settle.⁴² By shifting our attention away from the specific

³⁹ An eloquent exception is Patrick McAuslan, *Property and Empire: From Colonialism to Globalization and Back*, 24 SOC. & L. STUD. 339 (2015).

Constitutional law literature that often includes discussions on the crafting of property clauses, see, e.g., Heinz Klug, *Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law*, 35 J. LEGAL PLURALISM 119 (1995). Postcolonial and indigenous legal literature will be discussed below; note engagements with the idea of property as a human or international right, including SPRANKLING, *supra* note 8.

⁴⁰ Courts might engage in comparative analysis when they are faced with a new issue, but it is rare to see explicit appreciation of the connections between apparently domestic issues to larger global contexts and patterns in pursuit of legal solutions.

⁴¹ See generally SHAUNNAGH DORSETT & SHAUN McVEIGH, JURISDICTION (2012) (providing an overarching discussion the historical development of the concept of jurisdiction and the various forms that it takes).

⁴² For an insightful conceptualization of the way in which norms and regulatory regimes "settle," see Halliday & Shaffer, *supra* note 29; see also Terence

locational jurisdiction of the object of property and, instead, towards at the *processes* of the formation of those ideas, one can begin to discern how property thought and property regimes have been profoundly shaped by such encounters. This analysis implies that current differentiation of property law into, say, personal, real, and intellectual property is but a superficial reflection of the deeper roots the various dimensions of property law have in historical struggles and that therefore one ought to review one's assertions regarding the different forms of holding property (including owning, renting, and licensing) as well as the various regulatory regimes associated with property (for example, those associated with intellectual property registration, mortgages, investment, and securitization).

This living history of seemingly timeless ideas and evolving practices around the invocation, rejection, and consolidation of property claims is necessarily a story of its different actors and their varying roles within these stories. The property norms that operate at multiple levels of governance—local, national, international, and transnational—continue to play key roles in changing policy priorities of nation-state governments, international organizations, and global investors. From each vantage point, the stakes of property differ, as states clamor for foreign capital, and international development and financial organizations strive for the ideal mix of support and incentives, while hedge funds, real estate developers, and private equity pools seek out profitable placement opportunities with the least possible degree of “red tape” and yet also certainty regarding legal enforcement of property and contract claims.⁴³ Property regimes continue to arise, expand, and adapt in response to these different forces of influence. But, the more property law regimes are thought of as border-crossing, “spatialized” realms of economic and actual power,⁴⁴ questions of political agency, of accountability, and legitimacy appear to become more opaque.

Depending on the political economic context in which the conflict over “property” is carried out, property's “public”

Halliday, *The Recursivity of Law: Global Lawmaking and National Lawmaking in the Globalization of Bankruptcy*, 112 AM. J. SOC. 1135 (2007).

⁴³ See, e.g., DOREEN MASSEY, *WORLD CITY* (2007); RAHUL MEHROTRA, *ARCHITECTURE IN INDIA: SINCE 1990* (2011).

⁴⁴ See, e.g., DOREEN MASSEY, *FOR SPACE* (2005); SARAH KEENAN, *SUBVERSIVE PROPERTY: LAW AND THE PRODUCTION OF SPACES OF BELONGING* (2015).

dimension—what Morris Cohen described in 1927 as property’s affinity with sovereignty—varies in its visibility.⁴⁵ For Cohen and other Legal Realists of the 1920s and 1930s it was evident that the concentration of power that results from the allocation of rights to property to private actors is significant and should therefore be understood as a form of sovereign power. Building upon insights from Robert Hale and fellow Legal Realists as well as political economists of the earlier Progressive Era such as Richard Ely and John Commons, Cohen argued that those who own property exercise “power over the life of others” by determining rents, prices, and even the command of services through their payment for labor.⁴⁶ Through taxation and the ability to command services and the states’ protection of these processes, Cohen’s argument goes, “we have the essence of what historically has constituted political sovereignty.”⁴⁷

The Realists’ analysis, for all the lessons it bears, is not without its limitations—especially against the background of the type of state transformation that has come to mark Western nation states in the second half of the twentieth century. With a wholesale shift “from government to governance” and an ever-expanding sphere of private assumption of formerly public services (and assets), the differences between private power and public authority have become ambivalent. Over the past few decades, sovereignty has become further diffused across a plurality of private actors, who in turn have been taking on more and more of what was formerly under state responsibility or, at least, effective control. The more recent critique by scholars such as Claire Cutler and Fleur Johns of *lex mercatoria*’s success in rendering real power differentials in the transnational realm invisible⁴⁸ echoes and expands upon the concerns raised by progressive legal scholars and political scientists

⁴⁵ See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

⁴⁶ *Id.*

⁴⁷ *Id.* at 13.

⁴⁸ See Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order*, 34 J.L. & SOC. 116 (2007); A. Claire Cutler, *Legal Pluralism as the “Common Sense” of Transnational Capitalism*, 3 ONATI SOCIO-LEGAL SERIES 719 (2013); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003) [hereinafter CUTLER 2003].

a hundred years before with regard to the national context.⁴⁹ Building on the critique of market power in the domestic context⁵⁰ by Legal Realists, this transnational revival of the scrutiny of “private power” draws attention to how, as observed by Cutler, “private authority” has remained mostly outside the ambit of critical (international) law⁵¹ in large part because of the (perceived) divisions between public and private spheres of law and subjects: “[t]he authority of corporate law and transnational corporations, the major agents of corporate power, are minimized by statist political theories that discount the political significance of such corporations and by legal theories that do not regard them as legitimate ‘subjects’ or ‘sources’ of law.”⁵²

The divide in perception between public and private and the disproportionate focus on state-centric conceptions of sovereignty is an impediment to the development of a viable theory of democratic accountability vis-à-vis private power. Public International Law appears, in the face of rapid privatization and market-based and self-regulation, unable to adequately “check” private power in the transnational sphere on account of its continued focus on state agency and its confidence in political accountability even in the absence of a viable form of global government.⁵³ Moreover, as Cutler argues, these private actors are not passively gaining authority—rather, they are “deeply implicated in the ordering of state-society relations” in that they “operate to recast ‘public’ concerns as ‘private.’”⁵⁴ By doing so, they effectively remain outside

⁴⁹ See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLI. SCI. Q. 470 (1923); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COL. L. REV. 451 (1920); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COL. L. REV. 603 (1943); John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976); John P. Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

⁵⁰ See, e.g., HUGH COLLINS, *REGULATING CONTRACTS* (2002); Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007).

⁵¹ See Fleur Johns, *The Invisibility of The Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893 (1994) [hereinafter Johns 1994]; see also discussion in Part I.C. below.

⁵² CUTLER 2003, *supra* note 48, at 5.

⁵³ See Johns 1994, *supra* note 51; see also discussion in Part I.C. below.

⁵⁴ CUTLER 2003, *supra* note 48, at 5.

the purview of “democratic methods of scrutiny and review.”⁵⁵ As noted, this shift in power and the attending dilemmas regarding accountability and “public” oversight is a phenomenon occurring within and beyond the nation state and, as such, a prime example of what Saskia Sassen referred to as the place “where the work of globalization gets done.”⁵⁶ Cutler’s analysis cogently highlights the connections between the domestic and the transnational and exposes the limitations of an international legal framework oriented around state action. On both accounts, one is faced with the result that while there might be increased awareness of the rise of power exercised by private actors, the actual diffusion of that power and the ambivalent status of agency challenges rule-of-law based concepts of accountability, while the association of private power with the ordinary business of market functionality effectively neutralizes political critique.

Despite the critique offered by the Progressives and the Legal Realists and those whose work follows in their tradition today, the dominant view that private property is separate from public ideas of governance remains in place today. That ownership actually implies an exercise of power over non-owners is rarely accounted for in property regimes whose underlying values are the protection of that ownership, rather than the balancing of that power.⁵⁷ While *political* sovereignty has been conceptualized as entwined with the classic dimensions of control of territory and people,⁵⁸ *private* exercises of sovereignty over territory and people are far less accounted for in the law. Balancing the power exercised by private owners through regulation of use or redistribution of resources is often seen as an infringement of their private property rights, rather

⁵⁵ CUTLER 2003, *supra* note 48, at 5.

⁵⁶ Saskia Sassen, *The Global City: Introducing a Concept*, 11 BROWN J. WORLD AFF. 27, 35 (2005).

⁵⁷ See Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012); ALEXANDER 1998, *supra* note 30.

⁵⁸ See Joseph W. Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1 (1991); Borrows 1999, *supra* note 19; Harris 2017, *supra* note 19. For a critique of the concept of sovereignty from a postcolonial perspective, see Brenna Bhandar, *The Conceit of Sovereignty: Toward Post-Colonial Technique*, in STORIED COMMUNITIES: NARRATIVES OF CONTACT AND ARRIVAL IN CONSTITUTING POLITICAL COMMUNITY (Hester Lessard et al. eds., 2011).

than an integral part of a property regime.⁵⁹ This idea is crucial to the approach to legal analysis offered here. As will be seen below, once newly-arrived global actors (in current times, mostly private corporate ones) are able to establish an enforceable claim to land or other property superior to that of domestic actors who were previously using that property, a sphere of sovereign control is created, cities and landscapes shaped, resources are allocated, and societies are re-ordered, all raising crucial questions of transparency, accountability, and democratic processes of decision-making in those transformations.⁶⁰

The Legal Realists and those who have followed in their tradition have revealed much concerning the contradictions inherent in common law regimes and in liberalism more generally. What the following historical analysis attempts to add is the significance of the role of conquest and colonialism in shaping common law property thought and its contradictions—circumstances that are largely ignored in the Realist canon. One might consider this relative under-engagement in light of what postcolonial political theorist Uday Singh Mehta called the “neglected link” between liberalism and empire.⁶¹ In the very moment that the British, Dutch, and French “rightly conceived of themselves as having elaborated and integrated into their societies of political freedom,” they also “pursued and held vast empires where such freedoms were either absent or severely attenuated.”⁶² It is the legacy of those empires (and their underlying justifications) on property regimes that implicates conquest and colonialism as ever-relevant to a transnational analysis, and that benefits from analyses drawn from indigenous and postcolonial legal theories.

Several specific reasons for this engagement can be delineated. First, the ill-fitted property regimes enacted by colonial powers to govern their colonial subjects continue to have legacies in current property regimes in the Global North and Global South, as well as in regimes that cross their boundaries. Moreover, the acquisition of property rights—alongside the imposition of common law

⁵⁹ See ALEXANDER 1998 *supra* note 30; JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (2015).

⁶⁰ See CUTLER 2003, *supra* note 48, at 13.

⁶¹ See UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999).

⁶² *Id.* at 7.

conceptions of property—played an important role in expanding conquest and colonial efforts. And relatedly, the re-conception and acquisition of property rights continue to be of concern today in areas such as intellectual property that have been criticized as neo-imperial.⁶³ With regards to the legacy of conquest of indigenous land and peoples on current law, the connection is even more direct, as the occupation of their land continues today with scarce reparation.⁶⁴

Second, the conquest and colonial encounters are integral to this analysis of property because the *underlying assumptions* of many colonial-era property laws continue to be in operation through international development and investment projects. As has been well-observed by Balakrishnan Rajagopal, Sundhya Pahuja, M. Sornarajah and other scholars contributing to theories of “Third World Approaches to International Law”,⁶⁵ domestic laws in former colonies as well as international development projects and investment arrangements since the post War period in many ways mark continuities of rather than disjunctures from colonial projects of dominance and control of powerful groups. The continuity of exploitation occurs, for example: as natural and other resources are

⁶³ See discussion *supra* Part II.

⁶⁴ See, e.g., PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* (2001). For a fascinating theorization of indigenous claims to land and the imposition of state legal institutions in India, see PARMAR 2015, *supra* note 32. For powerful accounts of the ongoing discriminatory treatment of the property and sovereignty of Native Americans, see ROBERT A. WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); Singer 1991, *supra* note 58; Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 329 (2007).

⁶⁵ Third World Approaches to International Law re-theorizes public international law from plural vantage points in the Global South, including by retelling the history of its making and the significance of colonialism, tracing the legacies of colonialism in international law today, and critiquing current development orthodoxy in law and policy. On TWAIL generally, see Makau Mutua, *What is TWAIL?* 94 PROCEEDINGS OF THE ASIL ANNUAL MEETING 31 (2000); Obiora C. Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* 10 INT’L COMMUNITY L. REV. 371 (2008); James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011). For specific engagement with how international development, investment, and public international law continue colonial legacies of power differentials, elite class structures, and resource extraction, see Pahuja 2013, *supra* note 4; BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003); SORNARAJAH, *supra* note 7.

further siphoned off to the Global North;⁶⁶ through intergovernmental organizations that are meant to encourage fair multilateral negotiation (such as the WTO) but perpetuate structures of unequal bargaining between Global North and South;⁶⁷ and, as non-reciprocal concessions in trade and investment are made through coercive demands on Global South for regulatory parity with Global North states.⁶⁸ The network of domestic and transnational laws that support development projects (such as large infrastructure construction, extraction of natural resources, and sovereign debt lending) and legal regimes for investment appear to be value-neutral and in accordance with “accepted practices” of common law supporting capital movement and freer trade, despite the political choices and values that underly them.

Finally and most expansively, the critical engagements of indigenous and postcolonial theory with the laws of conquest and colonialism enable one to better see the power differentials and racial and ethnic inequality between (and within) the Global North and the Global South, and the entrenchment of those differentials in law and legal theory.⁶⁹ With that appreciation comes an understanding of the “postcolonial” that is not tied literally to whether a given place was colonized or not, but rather an understanding that serves as a lens through which to see “oppression of all communities historically treated as racially and ethnically inferior to Europeans.”⁷⁰

The last point warrants a brief further explanation. How can one understand the relationship between postcolonial theory and law? Eve Darian-Smith writes of the efforts of scholars of postcolonial law

⁶⁶ See discussion *supra* note 6, for further discourse on mining.

⁶⁷ For example, in negotiations around agricultural goods and textiles. For a historical analysis of the international regulatory treatment of sugar from a TWAIL perspective, see MICHAEL FAKHRI, *SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW* (2014).

⁶⁸ See SORNARAJAH, *supra* note 7.

⁶⁹ As Eve Darian-Smith has written, “This shift in terminology [from colonial/colonized to GN and GS] expands the lens of analysis from state-centered law in the context of specific national colonial enterprises to a more global post-Westphalian worldview that takes into account transnational, regional, and state interrelations.” Eve Darian-Smith, *Postcolonial Law in 18* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 647 (James D. Wright ed., 1998) (citing Falk).

⁷⁰ *Id.*

to engage with “the underlying orientalist assumptions in national and international law that affirm essentialized constructions of cultural difference.”⁷¹ In Darian-Smith’s words, “what links the legacy of postcolonial studies to contemporary analyses of legal orientalism is a central focus on the endurance of historically structured racial and ethnic divides between Western and non-Western societies despite a growing appreciation of their respective interdependencies.”⁷² That understanding captures two relevant ideas in postcolonial theory: the transnational nature of legal “interdependencies” and the appreciation of ideas of cultural, racial, and ethnic difference (specifically ideas around superiority); and how both are constructed and perpetuated. Both of these dimensions reflect the need for a theory of transnational property law to engage with postcolonial theory.

Edward Said’s concept of “orientalism”⁷³ remains ever relevant here in enabling one to see how Global North conceptualizes Global South, and vice versa, and how each conceptualize themselves in response to the mirror they see reflected. What, more specifically, does that imply for property regimes? In part, the dialectical dynamic of seeing described by Said sustains the myth of coherent, ahistorical common law property thought by (to put it bluntly) holding former colonies to a standard of coherence and enforceability that is not even present in the Global North countries in whose image the regimes are enacted.⁷⁴ For example, in economic development and investment policy literature, one often finds chastisement of so-called developing countries for not having strong, enforceable property rights and clear title. While this may sound fairly neutral, not only does it mask how formality of property has often been used as a way to disenfranchise the

⁷¹ *Id.* citing Ruskola, 2002.

⁷² *Id.*

⁷³ EDWARD SAID, *ORIENTALISM: WESTERN REPRESENTATIONS OF THE ORIENT* (1978).

⁷⁴ See generally Frank Upham, *Mythmaking In The Rule Of Law Orthodoxy* 7 (CARNEGIE WORKING PAPERS: RULE OF LAW SERIES, DEMOCRACY AND RULE OF LAW PROJECT, No. 30, 2002) (discussing the perpetuation of the myth that “rule of law” means legal certainty that exists in places such as the United States when, in actuality, that ‘certainty’ is not as present as it would seem).

marginalized,⁷⁵ it also does not acknowledge the contradictions in the Global North countries themselves who advocate for those reforms, such as their own selective enforcement.⁷⁶

2.1. *Conquest, Law, and Sovereignty*

This Section introduces several selected examples of conflictual encounters between European conquerors and indigenous populations and their land, in the process of which property law conceptions were both transplanted and imported as well as reshaped and newly constituted. These brief examples are meant demonstrate how the consolidation of two now dominant concepts of property actually took place: (i) the relationship between the idea of “use” of land and racial hierarchy and (ii) the entwinement of property and sovereignty. The examples below were chosen because of their articulations of legal justifications for the claiming of dominion over land. They are meant to provide an account—albeit cursory and incomplete—of historical circumstances in order to illustrate how political claims to land came to be justified and legalized. This engagement with conquest provides the necessary background for the analysis of conflictual encounters over the use of land, further explored in relation to Global South cities in the next Part.

The evolution of the legal regimes that Europeans used to justify the conquest and claims over indigenous land unfolded over several centuries, with different trajectories in different geographies. In the 16th and 17th centuries, it was well established amongst European states that land could be “taken” if it was unoccupied or abandoned.⁷⁷ As for land that was possessed by inhabitants, that idea of possession as implying rights of ownership would give way

⁷⁵ See discussion in Part III.C; see also Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 OSGOODE HALL L.J. 445 (2011) (discussing debates over the status of property rights during the drafting of the Indian Constitution).

⁷⁶ Laura Underkuffler, Keynote at The Annual Meeting of the Association for Property, Law, and Society (2015); Upham 2002, *supra* note 74.

⁷⁷ See generally IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 127-71 (5th ed. 1998); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (discussing the philosophical underpinnings and justification behind the original creation of legal property).

to a requirement of “occupation.” There were several interpretations amongst European nations of what constituted occupation over the following centuries. Most well-known is that of John Locke, whose interpretation required labor related to the land in order to claim legal occupancy.⁷⁸ Another concept of occupancy came from international legal theorist Emmerich de Vattel in the 18th century, who argued that indigenous peoples could not claim legal possession (and therefore occupancy) of the land on account of their apparent lack of permanent residence or use.⁷⁹ As Patrick Macklem has noted, the latter conception of occupancy is known as the “notice” theory in that the kinds of use required for occupancy were meant to be apparent to European countries.⁸⁰ As the Americas and what would become Australia, New Zealand, and surrounding islands were clearly inhabited by indigenous peoples, the understanding of “occupied” had to be one that conformed to those European norms of agricultural use and (visible) residence if it were to be used to serve the purpose of conquest.⁸¹

Various justifications were offered for taking land from populations deemed to be “uncivilized” through the vessel of “occupation.”⁸² Among those justifications, two in particular continue to have legacies in later American, Australian, and Canadian jurisprudence. First was the idea that the legitimacy of a claim to property was tied to how it was being used by the claimant—ie., for gathering, agriculture, or something else or apparently not at all. Understanding the evolution of “use” therefore necessitates a closer look at what ‘occupation’ entailed, how it was justified, and how both the content and justification evolved over time. Second is the idea that the hierarchy of race,

⁷⁸ LOCKE, *supra* note 77.

⁷⁹ EMMERICH DE VATTEL, *THE LAW OF NATIONS* Bk. 1, Chap. 18 at ¶ 209 (1758).

⁸⁰ MACKLEM, *supra* note 64, at 80; *see also* CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 11-23 (1994) (discussing theories of the origin of legal property).

⁸¹ *See* MACKLEM, *supra* note 64 (discussing the history of the legal significance of occupancy, as well as highlighting an argument that Aboriginal prior occupancy possesses more legal significance than it has been accorded in Canadian law).

⁸² *See generally* ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000* (2014) (discussing the many justifications offered to support the confiscation of land from indigenous peoples during European colonial expansion).

culture, and religion of the claimant was relevant to the designation of their claim as inferior.⁸³

The idea that occupation gave rise to a claim to *property* was central to European expansion during the 16th-19th centuries,⁸⁴ with shifting justifications for the exercise of such claims. At first justifications around the taking of land were primarily tied to religious and cultural superiority.⁸⁵ That perceived cultural superiority was then used to expand claims from occupation to forms of rule over populations. The associated reasoning shifted away from religion as time went on and political theories had to be reconciled with new forms of commercial life in the 17th and 18th centuries, as Andrew Fitzmaurice explains.⁸⁶ As part of this reconciliation, occupation began to be linked to the *use* of property as opposed to mere inhabitation or holding of the land, above all by rendering the land fit for agricultural purposes—"English agrarian capitalism" in Brenna Bhandar's account.⁸⁷ The idea of occupation was transformed to indicate uses of land that which 'improved' it—or 'developed' it, as one might say today.⁸⁸ By consequence, a

⁸³ See Singer 1991, *supra* note 58, at 44-55 (discussing a characterization of the U.S. property regime as a system of "racial caste" in relation to Native Americans); MACKLEM, *supra* note 64, ch. 4 (discussing the belief that cultural superiority justified the Canadian exercise of sovereignty); cf. Brian Slattery, *Paper Empires: The Legal Dimensions of French and English Ventures in North America*, in DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES (John McLaren, A.R. Buck & Nancy E. Wright eds., 2005) (discussing religious justifications for the seizure of land from native peoples during the colonization of the Americas). For a fascinating, comprehensive argument of how the entwinement of property and race in colonization involved more than just racial domination in territorial claims and colonial exercises of sovereignty, but rather the relationship was a dialectical one and was fundamental to political, social, and other forms of racial domination, see Bhandar 2011, *supra* note 58, at 66-88.

⁸⁴ FITZMAURICE, *supra* note 82, at 2-3.

⁸⁵ FITZMAURICE, *supra* note 82, at 8; LOCKE, *supra* note 77.

⁸⁶ FITZMAURICE, *supra* note 82. See also Purdy 2007, *supra* note 64.

⁸⁷ BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP 35 (2018).

⁸⁸ LOCKE, *supra* note 77. Robert Williams has argued that Locke served to justify common law property thought deeming that Native Americans did not have full property rights because they had not "developed" it and they did not recognize the same form of rights of ownership that common law did. Robert A. Williams Jr, *Documents of Barbarism: The Contemporary Legacy of European Racism And Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989). Brenna Bhandar provides a fascinating historical account of Irish political economist

society that occupied the land by improving upon it was seen to hold a superior right to property. Underlying this justification was the belief of cultural and civilizational superiority, which was believed to manifest itself through how societies used land.⁸⁹ Bhandar eloquently captures that link between improvement of land and assumed civilizational superiority by arguing that the English moved toward a scientific method of quantification of valuation of land *and people* and “created an ideological juggernaut that defined people and land as unproductive in relation to agricultural production and deemed them to be waste and in need of improvement.”⁹⁰ From here, she further argues, “ownership and subjectivity” were fused together “in a way that had devastating consequences for entire populations who did not cultivate their lands for the purposes of commercial trade and marketized exchange.”⁹¹

The combination of cultural superiority and the idea that non-agricultural use was of lesser worth than agricultural use created a lens through which land *seen* as unused was therefore considered *empty*. To perceive of such land as *terra nullius*⁹²—empty land—stood in stark contrast to generations of indigenous people living on it, and yet it served in a circular way in certain geographies to justify the idea that such land had just been ‘discovered’ and could therefore be occupied and claimed by Europeans. Once the occupation *of the conquerors* was established, so too was ‘dominion’—the right to control land. Dominion also, though, came to mean a claim to the exercise of sovereignty—not exclusive sovereignty but a form of sovereignty nonetheless—over people of that land as well. Over time, exercising control over those people

William Petty’s linking an apparent lack of cultivation of land by the Irish to justifications for English conquest. BHANDAR 2018, *supra* note 87, in particular Chapter 1.

⁸⁹ FITZMAURICE, *supra* note at 82, at 3 (noting that the indigenous were seen to have “moved from ‘hypothetical state of nature to an agricultural state’”).

⁹⁰ BHANDAR 2018, *supra* note 87, at 35.

⁹¹ BHANDAR 2018, *supra* note 87, at 35.

⁹² Note that in Fitzmaurice’s account, he is careful to trace how the use of the term in this way did not emerge until much later, at which time it was applied retroactively to justify conquest. On at least five different characterizations by historians on how *terra nullius* was used, including discussion around Fitzmaurice’s account, see Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 L. & HIST. REV. 1 (2010).

entirely—ruling them—added *imperium* to some exercises of dominion in settler colonialism.⁹³

Because the concept of “occupation” evolved in a way that encompassed sovereignty and *imperium*, this meant that the (imposed) laws of conquest represented entwined regimes of property and international legal claims. The justifications that were offered for the taking of land (the idea of use and racial superiority) as well as the imposition of imperial rule continue to have a legacy in how common law property law prioritizes claims to land today as well as engagements with indigenous sovereignty.⁹⁴

In Australia, that sovereignty over territory (and eventually over people) was blurred with Crown *ownership* of the *land* itself, as recounted by the Australian High Court in the 1992 *Mabo v Queensland* case concerning indigenous claims to title.⁹⁵ Justice Brennan, writing for three of the six justices in the majority, reviews the history of the Crown’s claims to sovereignty over the land inhabited by the indigenous Meriam people through the use of *terra nullius* and the subsequent recognition of those claims by Australian Courts in the following centuries.⁹⁶ He then turns to the various justifications for the “acquisition of sovereignty over the territory of ‘backward peoples,’” including the “benefits of Christianity and European civilization” and the idea that “Europeans had a right to bring lands into production if they were left uncultivated by the

⁹³ DAVID B. ABERNETHY, *THE DYNAMICS OF GLOBAL DOMINANCE: EUROPEAN OVERSEAS EMPIRES 1415–1980* 185–88 (2000); see Patrick McAuslan, *In the Beginning was the Law . . . An Intellectual Odyssey*, Draft Paper for *The Practice of Law and Development: Socio-Legal Approaches* Conf. held at Cornell Univ. (Apr. 18–20, 2004), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1008&context=elccs_pld [<https://perma.cc/8H4D-FEDU>]; see Purdy 2007, *supra* note 64; see also Matthew Craven, *Colonialism and Domination*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 862–89 (Bardo Fassbender, Anne Peters, Simone Peter, & Daniel Högger eds., 2012) (discussing the creation of legal structures justifying and legitimizing colonial and imperial activity).

⁹⁴ See, e.g., Ivana Isailović, *Indigenous Peoples’ Claims and Challenges over Control of Property*, in *RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW* 436–53 (Ugo Mattei & John D. Haskell eds., 2015).

⁹⁵ *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 at Brennan op., ¶¶ 45–56. The Court cites Roberts-Wray to explain the blurring of the “distinction between the Crown’s title to a colony and the Crown’s ownership of land in the colony.” *Id.* at ¶ 45.

⁹⁶ *Id.* at Brennan op., ¶ 33. The discussion included a reference to U.S. Supreme Court Justice John Marshall’s *Worcester v. Georgia*. *Worcester v. Georgia*, 31 U.S. 515, 543–44 (1832).

indigenous inhabitants.”⁹⁷ Based on that understanding of the “backwardness” of the population and the characterization of their use of the land as not cultivated,⁹⁸ the doctrine of *terra nullius* was expanded to include land that had been *inhabited*. This expanded view of *terra nullius* based the idea of habitation on the presence of law—more specifically, on a “hypothesis being that there was no local law already in existence in the territory” of indigenous people.⁹⁹

In the end, in recognition that “the common law should neither be nor be seen as frozen in an age of racial discrimination,”¹⁰⁰ the *Mabo* Court re-instated indigenous title on lands where the title had not already been legally extinguished, which was meant to overturn the expanded application of the doctrine of *terra nullius* to lands inhabited by indigenous people in Australia.¹⁰¹

How does this brief account of the evolution of legal justifications for the conquest of already-occupied land and sovereign peoples contribute to an understanding of property as transnational? The history told by the Australian High Court is a rich account of how the transnational encounters between the British and the indigenous people—in effect, a claim over land and people across jurisdictional borders—resulted in the creation of *new* (unjust) law and a sanctioned exercise of sovereignty that would be applied over centuries not only in what would become Australia but in other geographies as well. The account also reveals the historical circulation of ideas regarding indigenous property holdings. With

⁹⁷ *Id.* at Brennan op., ¶ 33. The Court also noted that land in this case had in fact been gardenized. *Id.*

⁹⁸ *Id.* The Court stated that the land was uncultivated despite the fact that it had been gardenized. *Id.* Not only was this circular reasoning—because the population was seen as ‘backward’, their use couldn’t have been cultivation—but also, note the double meaning of ‘cultivated’.

⁹⁹ *Id.* at ¶ 36 (citations omitted). Per this hypothesis, “the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.” *Id.* The Court also noted that this doctrine remained intact, despite the findings of later courts that there had, in fact, been indigenous law in existence at the time in question. *Id.* at ¶¶ 37-38.

¹⁰⁰ *Id.* at ¶ 42.

¹⁰¹ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at Order. See generally LARISSA BEHRENDT, *ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA’S FUTURE* (2003) (detailing the ongoing conflict despite the *Mabo* ruling).

regard to the justifications of the use of *terra nullius*, and the histories of encounters with indigenous people, the Court draws on cases from other jurisdictions through history as well as in then-present times, including the United States, India, and Jamaica. In the retelling of historical moments when *terra nullius* came to be and was expanded, international jurists such as Vattel, Vitoria, and Blackstone were drawn upon in the various opinions.¹⁰²

In the United States, while the concept of *terra nullius* was less explicitly drawn upon by judges,¹⁰³ a constellation of ideas around legitimate use and claims were transformed into a legal regime that limited the rights and the sovereignty of Native Americans. Through these cases one sees how the application of a particular concept of property—the designation of use—to the act of taking ownership of land resulted not only in justifying the act but in making it legal. This legal formation can be traced across several cases written by Chief Justice John Marshall in the early 1800s.¹⁰⁴ The first, *Johnson v. M'Intosh* in 1823, offered Marshall's own account of several stages of discovery and conquest and the associated rights of Native Americans,¹⁰⁵ before holding that Native Americans had rights of possession but not full property rights. Marshall's ruling limited their right to alienate their property to only the United States federal government. Marshall explicitly justifies this abridgment of the full rights attached to title by reference to the lack of cultivation of the land as well as the "savage" nature of the Native Americans.¹⁰⁶

¹⁰² *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at ¶ 33-35 (Brennan opinion); *id.* at ¶ 11 (Deane and Gaudron opinion) in particular.

¹⁰³ Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 L. & HIST. REV. 95 (2005).

¹⁰⁴ See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁰⁵ See Slattery's *Paper Empires* for a rich review of Marshall's linear stages of discovery and conquest in the context of Spain, France, and Britain's changing justifications and doctrines of conquest. Brian Slattery, *Paper Empires: The Legal Dimensions of French and English Ventures in North America*, in DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES (John McLaren, A.R. Buck & Nancy E. Wright eds., 2005).

¹⁰⁶ Marshall refers to the Native Americans as "fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest." *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823). See ROBERT A. WILLIAMS JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1992). Following Jedediah Purdy's argument, that characterization of

Jedediah Purdy reads *Johnson v. M'Intosh* as “not just a property case” but also as “the leading American case in the law of imperialism.”¹⁰⁷ Purdy argues that *Johnson* should be read as an encounter between the “competing claims of representatives of two political societies, one dominant, the other subordinate, within an extended system of such domination” and that “the question of the case is not which political society will prevail, but what concessions the dominant society will make to the subordinate one.”¹⁰⁸ His reading is even more convincing when one considers the legacy of the case and the hierarchy it imposed through its distinguishing of rights to property based on indigenous status. That legacy can be traced through the Dawes Act of 1887 which split up Native American landholdings into individual tracts to the current laws and procedures for the determination of tribal status,¹⁰⁹ the limitation of the sovereignty of tribes through legal regimes implicating property and political power, and the language used to justify these distinctions.¹¹⁰

In summary, through the encounters of conquest, the idea that property would be tied to sovereignty (that the political conquest of territory could morph to ownership claims over land and the control of people) becomes crystalized. The idea of the entwinement of property and sovereignty itself as well as the racialized hierarchy of legitimate land uses has legacies today in common law property.¹¹¹ Moreover, *conquest itself was strengthened through the associated claims to property*: transfers of land to the conquerors served as justification for violations of indigenous sovereignty more generally. The legal

“uncivilized” was not just associated with Native American societies but can be understood in the broader context of a distinguishing between “civilized” and “uncivilized” nations as per U.S. modes of imperialism. Purdy 2007, *supra* note 64, at 331.

¹⁰⁷ Purdy 2007, *supra* note 64, at 331.

¹⁰⁸ Purdy 2007, *supra* note 64, at 331.

¹⁰⁹ William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415 (2016).

¹¹⁰ WILLIAMS 2005, *supra* note 64; ROBERT A. WILLIAMS JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1992).

¹¹¹ This can be observed, for example, in the efforts to zone out racial minorities from American suburbs. See DAVID M. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2010); Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187-243 (2015).

and political architecture supporting claims of conquerors to that land and to exercise some form of rule over people¹¹² can be observed in many encounters around the world, continuing to the present day,¹¹³ for example in relation to Standing Rock in North Dakota in the United States,¹¹⁴ Algonquin land in Canada,¹¹⁵ and Juru sacred sites in Australia.¹¹⁶

This legalization of the taking of land through the transformation of the doctrines of 'occupation' and 'use' has powerful implications for the coherency of liberal property theory. First, the idea of a hierarchy of "use" at the top of which are superior societies who use land for wealth creation continues to endure. This conceptualization of property continues to justify shifting resources away from populations, and from there, even territory and self-rule and sovereignty.¹¹⁷ Second, the theory of what justified a claim to land (superiority of use) was a product of its historical context and motivations of certain historical actors. (More recently, agriculture, as a form of the highest cultivation of land would give way below to other uses such as industrial manufacturing.) Expressed differently, what this example illustrates is that property theory is not ahistorical—it was formed in response to particular circumstances. The myth of ahistorical property doctrine only furthers its ability to

¹¹² On the paternalism of colonialism, see DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

¹¹³ For example, Patrick McAuslan has traced the use of land law in New Zealand as 'a weapon of colonization.' McAuslan 2015, *supra* note 39, at 343. Burger and Frymer use American ideas of empire to trace the legal treatment of Native American property to the current international IPR regimes on seeds. Michael Burger & Paul Frymer, *Property Law and American Empire*, 34 U. HAW. L. REV. 471 (2012). See also Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1 (2017).

¹¹⁴ Kyle Whyte, *The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism*, 19 RED INK: AN INTERNATIONAL JOURNAL OF INDIGENOUS LITERATURE, ARTS, & HUMANITIES 154 (2017).

¹¹⁵ Ian Austen, *Vast Indigenous Land Claims in Canada Encompass Parliament Hill*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/world/canada/canada-first-nations-algonquin-land-claims.html> [<https://perma.cc/N2SG-2XT3>].

¹¹⁶ Ben Smee, *Adani Coal Port Faces Possible 'Stop Order' After Traditional Owners Object*, GUARDIAN (July 5, 2018), <https://www.theguardian.com/environment/2018/jul/05/adani-coal-port-faces-possible-stop-order-after-traditional-owners-object> [<https://perma.cc/89T3-XRNX>].

¹¹⁷ See MACKLEM, *supra* note 64.

make opaque political decisions around the allocation of land and resources.

Third, these moves worked to entrench a British colonial version of common law property, and attempted to foreclose the plurality of indigenous conceptions of land claims as well as their ways of relating to land.¹¹⁸ Recognizing a more pluralistic conception of property would have significant implications for land distribution today. For example, accepting a plurality of conceptions around claiming title would force Canadian law to reconcile itself with indigenous methods of claiming territory.¹¹⁹ Furthermore, plurality also implies something broader—that entire conceptions of the relationship between people and land need re-telling. As Macklem notes, “[d]efining occupation by European standards of cultivation and notice exclude[d] from the outset legal consideration of the fact that many Aboriginal people related and continue to relate to land

¹¹⁸ See, e.g., Brian Slattery, *The Legal Basis of Aboriginal Title*, in *ABORIGINAL TITLE IN BRITISH COLUMBIA: DELGAMUUKW V. THE QUEEN* (Frank Cassidy ed., 1992); Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (2014) (offering a pluralist conception of law that is dialogical and transformative rather than merely inclusive). See generally Jose Mencia Molintas, *The Philippine Indigenous Peoples’ Struggle For Land And Life: Challenging Legal Texts*, 21 ARIZ. J. INT’L & COMP. L. 269 (2004) (discussing conflicts over land in the context of the rights of indigenous peoples in the Philippines); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291 (2000) (discussing Native American understandings and claims to property rights); Richard Overstall, *Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order*, in *DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES* 22-49 (John McLaren, AR Buck & Nancy E Wright eds., 2005) (discussing Western legal systems’ difficulties in comprehending indigenous Peoples’ understandings of property). See Paul Nadasdy, *“Property” and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations*, 104 AM. ANTHROPOLOGIST 247 (2002) (discussing how “a particular, possibly erroneous, construction of indigenous law became geographically extended and imposed as legal authority for a universalized notion of “customary tenure”). See also Heinz Klug, *Defining The Property Rights Of Others: Political Power, Indigenous Tenure and The Construction Of Customary Land Law*, 35 J. LEGAL PLURALISM 119 (1995) (discussing the same topic with reference to South Africa).

¹¹⁹ See MACKLEM, *supra* note 64, at 76 explaining how “the law of Aboriginal title recognizes that, if they can demonstrate that their ancestors exclusively occupied territory at the time Britain asserted sovereignty and that they continued to occupy the territory in question, Aboriginal people enjoy the right of exclusive use and occupation of such territory for a variety of purposes.”

See also Bhandar 2011, *supra* note 58, at 64-74 (examining the development of Canadian legal criteria necessary to establish aboriginal title).

in ways that defy traditional European understandings of productive use and notice.”¹²⁰ The discussion around the transformation of cities in the Global South in Part III picks up on this idea of using land use as a tool to promulgate narrowly conceived ideas of modernity at the expense of more pluralistic relationships to land and urban space.

Fourth, as Jedediah Purdy has argued with reference to *Johnson*, this legal treatment of indigenous claims to land effectively “produce[d] two bodies of international law: one governing relations among full sovereigns, the other governing relations between full sovereigns and imperfect sovereigns.”¹²¹ The logic of the latter—the laws that govern encounters between full and imperfect sovereigns—was applied in *Johnson* as well as in other cases determining the common law status of indigenous claims to land. The treatment of claims to property was foundational to the idea that indigenous sovereignty was somehow a lesser form—an idea that continues to structure relations between common law regimes and indigenous regimes even today.¹²²

Finally, as explored above, the hierarchy of ‘use’ mutually constituted and reinforced ideas around superiority of culture and race, which were then deployed to justify exercises of control over land and people. That justification of a racialized hierarchy extended far beyond property in land¹²³ and underpinned exercises of sovereignty. It was also foundational to the idea that people of certain races could themselves be considered the property of others—the foundational concept underpinning the transatlantic system of slavery.¹²⁴

¹²⁰ MACKLEM, *supra* note 64, at 81.

¹²¹ Purdy 2007, *supra* note 64, at 341.

¹²² See Singer 1991, *supra* note 58, at 4 (commenting on the “double standard” applied to Native Americans and non-Native Americans).

¹²³ See Bhandar 2011, *supra* note 58, at 69.

¹²⁴ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (stating the idea that people could be considered property, foundational to systems of slavery around the world, deserves its own transnational treatment and is unfortunately outside the scope of this Chapter’s focus on land-related concepts of property).

2.2. *From Colonial to Constitutional and Developmental Property Regimes*

Colonialism in its various forms was also ingrained through occupation and the exercise of dominion. Colonial rule over time, place, ruler, ruled, can hardly be generalized, nor can the different approaches to property that were entrenched through their processes. One cannot overstate the impact of the imposition of other systems of property holding, rights, and use over so much of the world. Moreover, the exchange of ideas regarding rights and regimes over land, and the formation of ideas through those colonial encounters, provide yet another dimension through which the perceived past is actually an ongoing moment for property theory. This Section will trace one thread of analysis in particular: the legacy of colonial-era land regimes as revealed in the political choices and tensions during the writing of new constitutions.¹²⁵ It will explore this phenomenon in India and South Africa before turning in the next Section to the legacy of colonial-era legal regimes more generally and the extent of that legacy's impact on economic development and investment law and policy still today.

As postcolonial political scientist and anthropologist Partha Chatterjee has noted, the key concern in legal-constitutional framework of postcolonial politics is "the question of social (including economic) transformation:

Whatever the form of the transition from colonial rule—whether a peaceful handover of power or an armed liberation war—the new postcolonial regime almost everywhere was confronted with the pressing necessity of transforming, whether gradually or radically, the inherited institutions of colonial society . . . the extent to which a set

¹²⁵ See Upendra Baxi, *Postcolonial Legality: A Postscript from India*, 45 VERFASSUNG UND RECHT IN ÜBERSEE/LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 178, 187 (2012) (stating "[a] central problem [of Third World Constitutionalism] has been one of redefinition of property relations. Given the diversity of patterns of colonization and national resistance movements, postcolonial legality furnishes divergent narratives.").

of precommitted foundational laws should bind the transformative acts of the new regime.¹²⁶

The decision to continue or to undo colonial-era property distribution is key to that transition. In the Global South during the twentieth century, these tensions often came to the surface during the deliberation of new constitutions.¹²⁷ The deep significance of who was able to hold land through colonial rule and for what ends can be evidenced by the significant debates that took place around assigning land rights that perpetuated the status quo or that reformed land regimes to be more equitable. At the heart of this tension was an underlying motivation that in order to present a newly formed government to the world as a stable protector of a liberal rights regime, certain and secure rights to property were perceived as a must.

Two brief examples follow—India in the late 1940s and South Africa in the 1990s. What is important are the questions raised in the respective assemblies and each example's connection to the other. These debates and transformations did not happen in an ahistorical or acontextual vacuum, and each nation's connection to dominant ways of conceptualizing property was made evident in the manner this topic was debated, adapted, and emergent.

In India, for example, for several years after gaining independence of 1947, a significant debate regarding property rights clauses took place during the writing of the Indian Constitution in the Constituent Assembly.¹²⁸ Assembly members struggled with whether to preserve the status quo of property holdings—and the accompanying social order—or to attempt a massive societal transformation. The debate raised many foundational questions for the new government. It had to decide whether the new legal regime

¹²⁶ Partha Chatterjee, *Introduction: Postcolonial Legalism*, 34 COMP. STUDIES SOUTH ASIA, AFRICA & MIDDLE EAST, 224, 224-25 (2014).

¹²⁷ See generally Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational And Comparative Approach*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 417 (G. E. Van Maanen & A. J. van der Walt eds., 1996) (discussing the relationship of customary land use systems and European legal property frameworks in developing countries); ALEXANDER 2006, *supra* note 9.

¹²⁸ See CONSTITUENT ASSEMBLY DEBATES OF INDIA, <http://cadindia.clpr.org.in/> [<https://perma.cc/L6KL-TXK7>]. See generally Gupta 2011, *supra* note 75; GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE (2003).

would signal its commitment to strong property rights in the classical liberal sense (by deeming the right to property a fundamental constitutional right, and thereby preserving current landholdings) or whether it would decisively try to rectify the unequal distribution of land entrenched during colonial times by supporting various state programs to redistribute land holdings. The former—strong property rights—would continue the colonial-era regime of land acquisition found in the Land Acquisition Act of 1894 that the British had imposed.¹²⁹ The latter—land redistribution—would forge a bold new path for the newly independent nation but it would also be a move away from the dominant common law property regimes (found in England and America). This choice echoed larger tensions faced by the newly independent former colonies between, in Upendra Baxi's words, "the *liberal bourgeois*" and "*revolutionary socialist*" forms of constitutionalism.¹³⁰ These two discourses manifest themselves in property clauses as: "[T]he socialist postcolonial form (SPF) and the capitalist postcolonial form (CPF). If SPF celebrates the denial of ownership in the means of production (private property), CPF venerates rights in private property."¹³¹ That difference in the conception of private property has crucial implications for the class structure and contours of citizenship:

Whereas in CPF political representation in liberal constitutionalism is a function of class domination, in the SPF "state" such representation stands collectivized though the Party always claiming to represent "workers," "peasants," and "masses". [sic] If SPF imagines adjudication as a way of markedly pedagogic role in the construction of the new socialist human person; CPF insists on a relatively autonomous liberal self of its citizens (rational choice actors) pursuing their own ends of private interests (freedoms to define their life projects).¹³²

¹²⁹ The origins of the Act can be traced back to at least 1824. See Gupta 2011, *supra* note 75.

¹³⁰ Baxi, *supra* note 125, at 182.

¹³¹ Baxi, *supra* note 125, at 182.

¹³² Baxi, *supra* note 125, at 182.

Accompanying India's choice regarding its vision of citizenship was also a significant question of federalism: how much power would be delegated to or left with states to decide the property question? And, underlying *that* question was a further query about the nature of Indian federalist government: did Indian states have residual or delegated power to decide such fundamental questions?

Throughout the Constituent Assembly debates in India, numerous other constitutions were examined and drawn from—for example, constitutions from Ireland, Yugoslavia, the United States, and the U.S.S.R.¹³³ Members of the Assembly drew from a variety of governmental forms to debate how power should be distributed horizontally between branches of government and vertically between the state and federal levels. During these debates, Assembly Members referenced slavery in America, Marxist theory, Proudhon and many other examples of property thought that they felt India should heed (or, in the case of slavery, avoid) at that time.¹³⁴ Further, some members were very concerned that including a strong property rights regime would become a “Magna Carta for the capitalists”¹³⁵ and that already-existing property holders would continue to disproportionately hold valuable resources. It was believed that this entrenchment would make the Assembly's goal of moving towards a “classless society”¹³⁶ even more difficult.

While the drafters eventually included a fundamental right to property that recognized that private property could be acquired by the government through law for a public purpose and with compensation (similar to other common law constitutions), the issue was far from settled. The ensuing battle between land reform and entrenched status quo property rights moved back and forth between the Supreme Court and Parliament through a series of cases and legislative acts.¹³⁷ At the heart of this debate was the

¹³³ See generally CONSTITUENT ASSEMBLY DEBATES OF INDIA, Book No. 11 Doc. 160 ¶ 32 (Nov. 19, 1949) (speech by Damodar Swarup Seth), <https://indiankanoon.org/doc/25415/> [<https://perma.cc/G55N-HX4V>].

¹³⁴ See generally *id.*

¹³⁵ *Id.*

¹³⁶ This is a reoccurring theme in Constituent Assembly Debates. See CONSTITUENT ASSEMBLY DEBATES OF INDIA, Book No. 9 Doc. 137 ¶¶ 55-60 (Sept. 10, 1949) (speech by Damodar Swarup Seth), <https://indiankanoon.org/doc/797053/> [<https://perma.cc/7W22-KHNY>].

¹³⁷ See Gupta 2011, *supra* note 75.

distribution of power between the judicial and legislative branches, as well as between the federal and state governments. Through these cases, the boundaries of judicial review, legislative power to amend the Constitution, and the ongoing question of states' prerogative to enact land reforms were fought over, shifted, and eventually settled upon.

In 1978, the Indian Parliament took the right to property out of the "Fundamental Rights" section of the Constitution and redrafted it as a weaker provision which would allow for state-level land reform.¹³⁸ While that amendment did allow some land reform acts to be implemented, since India's transformation toward economic liberalization in the late 1980s and early 1990s, the *absence* of a protected fundamental right to property has enabled the government to appropriate small land holdings in the name of 'economic development' and to redistribute them towards private industry and mass agriculture.¹³⁹ A debate over the these effects continues still today:

The postcolonial quest for equity in property relations continues, though beset by the inheritance of colonial inequities aggravated by malgovernance practices . . . The spread of foreign direct investment and multinational capital (while posing a different order of challenges to social activism and human rights movements) also presents a relatively bleak future for agrarian reforms. The voracious appetite of multinationals devours prime agricultural lands, forests, and environment (that provide the necessary infrastructure for their profit and power). Postcolonial constitutional texts could not have anticipated the context of globalization; the task of interpretation has to contend with the fact that constitutions become merely the "local" particular that has to adjust somehow to the "universal" in the global.¹⁴⁰

As Baxi's account reveals, the mal-distributive effects of the common law property regime that was put in place continues, not

¹³⁸ See Gupta 2011, *supra* note 75.

¹³⁹ But see The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013, India Code (2013).

¹⁴⁰ Baxi, *supra* note 125, at 189.

only through domestic means, but also through global, transnational flows of resources, actors, and property thought.

In South Africa in the mid-1990s, the writing of the new post-Apartheid Constitution also raised significant questions around the issue of entrenched property versus redistribution.¹⁴¹ While these questions in some ways mirrored those faced by India—for example, the existence of legal regimes that enshrined a vastly inequitable distribution of landholdings—in other ways, these questions were different, particularly because South Africa needed to grapple with racial inequality more explicitly enshrined in their original law. That history of racial discrimination was over a century old by the time apartheid ended and was well-entrenched in the law and in unequal property distribution.¹⁴² When the time came for writing a new constitution, a strongly protective property rights regime would have maintained the status quo of racial inequality not only in land but economically and socially as well. As South African property law scholar André van der Walt explains,

[g]iven the central role that apartheid land-use and housing policies played in the institutionalisation of race-based inequality, property law specialists and policy makers recognised that the large-scale political and social changes that inevitably had to accompany democratisation would have to include significant reforms of land use policy and of property law in general.¹⁴³

The issue of redistributing property to those who had previously been excluded from securing title was crucial to the promise of truly dismantling apartheid. At the same time, the establishment of secure property rights in a new constitution was seen as a key aspect in the reform of the political and societal stability. The echoes of the

¹⁴¹ See A.J. VAN DER WALT, *PROPERTY IN THE MARGINS* (2009); ALEXANDER 2006, *supra* note 9; HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS* 55 (2010) [hereinafter KLUG 2010]; Matthew Chaskalson, *The Property Clause: Section 28 of the Constitution*, 10 S. AFR. J. ON HUM. RTS. 131 (1994); Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations Over The Protection Of Property Rights In The Interim Constitution*, 11 S. AFR. J. ON HUM. RTS. 222 (1995).

¹⁴² See generally JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978) (discussing the history of racial discrimination in South African law); MARTIN CHANOCK, *THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902-1936: FEAR, FAVOUR AND PREJUDICE* (2001).

¹⁴³ See A.J. VAN DER WALT, *PROPERTY AND CONSTITUTION* 1 (2012).

post-colonial constitutional process in India in the 1940s in the South African experience post-apartheid in the 1990s are noteworthy. According to van der Walt, the Indian struggle between the courts and parliament was a cautionary tale for South Africa. It highlighted ongoing societal tension between those with access to land and those without; drafters in South Africa sought to avoid the kind of entanglement India had experienced.¹⁴⁴ After significant debate,¹⁴⁵ the South African Constitution was drafted to include a strong right to property qualified by a sizeable provision detailing what kinds of ‘use’ were acceptable as “public use.”¹⁴⁶ Moreover, this provision did not stand on its own. Other provisions regarding social, cultural and economic rights, including housing, were included and provided more concrete structural support to the ideal of moving from apartheid to democracy.¹⁴⁷

The issues of reform versus entrenchment, change versus status quo, and concentration versus equity arose in many postcolonial and post-conflict societies, each with its own history of who had been able to hold property, and each with its own conception of what kind of society and division of resources it might have as an independent state. In many of these places, multiple property regimes were at work simultaneously—indigenous law, colonial law and its legacies, comparative law, and foreign claims to land and resources—each with their own property languages, concepts, and values. How property regimes would be designed in the aftermath of these postcolonial or post-conflict moments required a fierce examination of the fundamental notions of statehood and sovereignty. Simultaneously, that design would also send signals to other countries and societies as to the nature of law in the newly

¹⁴⁴ *Id.* at 4.

¹⁴⁵ KLUG 2010, *supra* note 141, at 55.

¹⁴⁶ *Id.* at 55-58 (discussing in Article 25 how there were some who advocated for land redistribution to be enshrined in the Constitution in a way that would have left out a requirement for “public use” entirely).

¹⁴⁷ KLUG 2010, *supra* note 141, at 132-46 (discussing in Article 26, on the right to housing, of the socio-economic rights enshrined in the Constitution, that land distribution continues to be inequitable, a circumstance that a property clause more explicitly crafted to deal with racial inequality might have alleviated); Heinz Klug, *Hybrid(ity) Rules: Creating Local Law in a Globalized World*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., 2002).

independent state—signals regarding political and economic legitimacy.¹⁴⁸

As the primary institution through which the Global North encountered the Global South transitioned from colonialism to economic development,¹⁴⁹ international agencies and transnational economic actors began to exercise increasing influence on property regime design. In particular, the International Monetary Fund (“IMF”) and the World Bank attached conditions to their loans and projects (conditionality) that mandated the establishment of certain forms of property regimes.¹⁵⁰ This continued into the 1980s and 1990s and into the new millennium as the emphasis on development evolved into a focus on the rule of law and various forms of investor protection. Through the 1980s and 1990s, the international financial institutions (“IFIs”) promulgated the empowerment of private capital—and *foreign* capital in particular—as the way forward for development through the Washington Consensus.¹⁵¹ The Washington Consensus was a set of free trade and capital flow oriented policy programs that came to be powerfully orthodox and implemented in many places. They included a number of legal reforms that were meant to make investors feel secure—including ensuring their property rights, contract enforcement, and other supportive legal architecture.¹⁵² That a key dimension of the Washington Consensus was that this protection of property rights would have profound effects on IMF and World Bank conditionality

¹⁴⁸ This was true, even late in the 20th century, in central and eastern Europe as those countries negotiated to become part of the European Union (EU). There as well, the lure of entrenching a liberal, individualized property rights regime remained strong.

¹⁴⁹ See GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* (Patrick Camiller trans., 2014); SUNDHYA PAHUJA, *DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011).

¹⁵⁰ See World Bank, *Land Reform* (May 1975).

¹⁵¹ See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED* (John Williamson ed., 1989); World Bank, *World Development Report 1997: The State in a Changing World* (May 1997).

¹⁵² Williamson, *supra* note 151; See Priya S. Gupta, *From Statesmen to Technocrats to Financiers: Development Agents in the Third World*, in *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* (Luis Eslava, Michael Fakhri, & Vasuki Nesiah eds., 2017).

for the decades to come, as resources continue to be allocated in this direction.¹⁵³

2.3. *The Protection of Foreign Investment through Property Regimes*

The protection of property rights for foreign investors has a long history, of which IFI policy is a relatively recent chapter.¹⁵⁴ At least since the 17th and 18th century activities of the Dutch East India Company, have states pushed for property rights recognition outside of their borders.¹⁵⁵ That tension between the interests of “capital-exporting states in developing external norms to protect foreign investment through international law” and those of “capital-importing states in assert[ing] total domestic control of incoming foreign investment”¹⁵⁶ played out initially in state-to-state negotiation and treaties. Through the centuries, the more powerful interests of capital-exporters left their mark through the formation of customary international law and norms with a strong inclination towards investor protection, which continues to manifest itself in recent times and in new fora.

The growth of investment regimes, in particular with regard to the protection of foreign investors’ rights to property, represents another powerful genealogy of property law evolution with a profoundly transnational reach. The investment narrative of

¹⁵³ See *Conditionality Revisited: Concepts, Experiences, and Lessons*, in WORLD BANK PUBLICATIONS, 3, 19, 63 (Stefan Koeberle et al. eds., 2005), <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1114615847489/Conditionalityrevisedpublication.pdf> [https://perma.cc/NVS5-HWNN] (reviewing that conditionality in 2005, and recognizing that in the 1990s, a new era of conditionality had been ushered in by donors, who “sought to improve the protection of private property rights and create a conducive environment for private sector development.” As a result, the share of policy-based lending shifted significantly towards public-sector reforms, which included the protection of property rights. They note that this was particularly true for “poor-performing countries”). See also JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

¹⁵⁴ See CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* (1985); KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* (2013); NOEL MAURER, *THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893–2013* (2013).

¹⁵⁵ MILES, *supra* note 154.

¹⁵⁶ See SORNARAJAH, *supra* note 7, at 31.

property brings into sharper relief the conflictual sites at which property is at the center of capital flows, licensing, and disputes over title and prior use of land, as well as disputes over long-held practices in relation to land.¹⁵⁷ At the heart of such struggles we are repeatedly confronted with starkly asymmetric dynamics between local stakeholders' and multi-national corporations' claims to property. As such conflicts erupt and unfold around a widely diverse range of vested interests including resource extraction, land use, and indigenous practices, the roots of these conflicts are inextricably linked to the deep history and geography of property's transnational formation.

As M. Sornarajah's seminal account of foreign investment law examines, an international legal regime around investment was first formed between the United States and Latin America through the United States' efforts to protect the investments of its nationals.¹⁵⁸ Over time, and with decolonization in Africa and Asia, investor protection became more internationalized.¹⁵⁹ This internationalization brought to the fore issues around the universalization of the Calvo Doctrine (Argentine jurist Carlos Calvo's idea that foreigners should not enjoy more rights than citizens in Latin American countries, and should, therefore, be subject to local jurisdiction for disputes involving their investments in those countries¹⁶⁰ and permanent control over natural resources¹⁶¹).¹⁶² Later phases of international investment law were

¹⁵⁷ See MACKLEM, *supra* note 64 (Chapter 2 in particular describes the ongoing destruction of Aboriginal culture in Canada); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2003) (noting the dominant account of property title, international capital, and development).

¹⁵⁸ See SORNARAJAH, *supra* note 7, at 32-35.

¹⁵⁹ See SORNARAJAH, *supra* note 7, at 31-42.

¹⁶⁰ See Patrick Juillard, *Calvo Doctrine/Calvo Caluse*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689?prd=EPIL> [<https://perma.cc/NPQ6-NE9M>].

¹⁶¹ See SORNARAJAH, *supra* note 7, at 31-42; Pahuja, *supra* note 6; Georges Abi-Saab, *Permanent Sovereignty over Natural Resources and Economic Activities*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 597 (Mohammed Bedjaoui ed., 1991).

¹⁶² *Id.* at 35 (noting through the NIEO and the Charter of Economic Rights and Duties of States).

marked by the Washington Consensus and a neoliberal ascendancy of the norm of investor protection.¹⁶³

During and after the 1990s, the idea of investor protection has become of the utmost importance — not just in the conditionalities of the IFIs referred to above, but also in regional and bilateral trade and investment treaties.¹⁶⁴ This shift is manifested in: a change of *actors* involved in these disputes from state-state to investor-state; a change of the *forum* of dispute settlement from those of international legal institutions to those of arbitration;¹⁶⁵ and a change of the substantive *law* applied in that forum. It is important to highlight that the change in law increasingly prioritized foreign investors at the expense of other interests, including in regimes governing the expropriation of the property of foreign investors.¹⁶⁶ While customary international law had permitted states to expropriate property for a ‘public purpose’ with full compensation, as long as there existed due process and an “absence of discrimination between foreign investors and different home states,”¹⁶⁷ these regimes have given way to providing hospitable environments for foreign investment and allowed for the development of a powerful policy orthodoxy.¹⁶⁸ With the rise of this orthodoxy, trade and

¹⁶³ SORNARAJAH, *supra* note 7, at 43-68 (detailing a discussion on resistance — on the reality of whether international investment agreements do in fact attract foreign direct investment, and if such agreements are worth the trade-off of state sovereignty); FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS (Olivier De Schutter et al. eds., 2013).

¹⁶⁴ See Gus Van Harten, *Private Authority and Transnational Governance: The Contours of the International System of Investor Protection*, 12 REV. INT’L POL. ECON. 600, 608-09 (2005) [hereinafter Van Harten 2005] (noting the reasons for the proliferation); JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* (2011) (examining the increasingly fragmented treaty regimes governing international investment).

¹⁶⁵ As Adkins and Grewal point out, however, investment arbitration for the protection of foreign investors has a long history, used at least since the eighteenth and nineteenth centuries to protect colonial investments, before its manifestation as a “tool of economic development” to provide foreign capital with the “special protection” that was believed necessary “in order [for it] to flow into areas subject to ongoing economic and political uncertainty.” Cory Adkins & David Singh Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, 126 YALE L.J. F. 65, 66 (2016).

¹⁶⁶ SORNARAJAH, *supra* note 7, at 191-245.

¹⁶⁷ SORNARAJAH, *supra* note 7, at 191.

¹⁶⁸ SORNARAJAH, *supra* note 7, at 191-245.

investment agreements have become more specific regarding investor protection, including for example, with the inclusion of provisions specifying arbitration as the chosen forum for disputes and the empowering of investors to bring direct actions in those arbitral fora.

The increasing reliance on the new type of forum has transformed how the law is applied. Arbitrators, who had “been schooled in international commercial arbitration where property and contract were sacrosanct,” emphasize the priority of investor protection over other considerations.¹⁶⁹ In effect, as Gus Van Harten argues, “states have turned private arbitration into a method of governance based on generalized investor-state arbitration,” in that this system of investor protection relies on the state to “establish institutions that in turn regulate the use of public authority at the domestic level.”¹⁷⁰ But, “the system of investor protection [also] relies on the coercive authority of states, within their territory, to seize the assets of other states and make those assets available to investors.”¹⁷¹ Van Harten summarizes the issue of delegation of governance prerogative of states:

[t]he system of investor protection . . . reflects an evolution of that model in the context of an international political economy in which the interests of multinational enterprises are prioritized in regulatory decision-making *The system of investor protection is a model of transnational governance that relies on state authority in order to authorize and enforce investor claims while affording broad decision-making power to private individuals and organisations. The exercise of state power is made*

¹⁶⁹ SORNARAJAH, *supra* note 7, at 199. The 2000 ICSID award in *Santa Elena v. Costa Rica* is a notable example. See *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (2000). For a critical review of the prioritization of investor compensation over environmental interests, see MILES, *supra* note 154, at 166-67, and Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENVTL. L.J. 198 (2002). For an insightful discussion of how the NAFTA Article 1105 principle of “minimum standard of treatment” was used in a NAFTA arbitral forum to justify circumventing Canada’s effort to protect the environment and interests of indigenous peoples in Nova Scotia in *Clayton v. Canada*, see Adkins & Grewal, *supra* note 165. See generally KYLA TIENHAARA, *THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY* (2009).

¹⁷⁰ Van Harten 2005, *supra* note 164, at 602, 610.

¹⁷¹ *Id.* at 610 (drawing from (Stone Sweet, 2002)).

*subject to private discretion exercised both by private investors and private arbitrators.*¹⁷²

The systemic nature of the just-described investor protection regime can be seen in the broader context of global capital flows and financial regulation. Investment protection is but one key element in an overarching shift of national and international rulemaking that prioritizes the removal of regulatory obstacles to the advantage of an increasingly mobile and volatile flow of investments in and out of national and regional markets.

Investor protection through arbitration has also another dimension symptomatic of the shift in governance. It is now standard for trade and investment treaties to include the mechanism of Investor State Dispute Settlement (ISDS) through which corporations and investors can seek redress from countries *directly* for infringements on their property rights. Van Harten has referred to this proliferation of “investor state arbitration as the backbone of an emergent international system of investor protection.”¹⁷³ The system has moved from one where states represented investor interests in negotiation and dispute resolution, to one of direct representation, but only for certain non-state actors. Refugees, migrants and those who would claim human rights violations do not have this kind of standing.¹⁷⁴ The recent cases brought by the tobacco giant Philip Morris regarding intellectual property rights illustrate the controversy around the use of these mechanisms.

In 2010, Philip Morris International (“PMI”) filed an action seeking \$25M in damages as well as injunctive relief against Uruguay in the International Centre for Settlement of Investment Disputes (ICSID) alleging that the country’s introduction of new health regulations stipulating that tobacco packaging include pictures and warnings about the dangers of smoking.¹⁷⁵ PMI claimed that these regulations, as well as others, restricted sales of more than one brand of their cigarettes and were treaty violations in that they would impair their investment and amounted to an

¹⁷² Van Harten 2005, *supra* note 164, at 610-11 (emphasis added).

¹⁷³ See Van Harten 2005, *supra* note 164, at 602. See also VAN HARTEN 2008, *supra* note 7.

¹⁷⁴ Van Harten 2005, *supra* note 164, at 602-03.

¹⁷⁵ *Philip Morris v. Uru.*, ICSID Case No. ARB/10/7, Request for Arbitration (2010).

expropriation.¹⁷⁶ PMI filed similar actions in Australia and Norway, and threatened them in Togo, Namibia and the Solomon Islands.¹⁷⁷

PMI was claiming, in effect, was a new kind of “regulatory taking” on an international scale that would limit a country’s prerogative to issue regulations that might interfere with PMI’s potential future profits. After a much-publicized arbitral battle, the tribunal for the Uruguay decision in 2016 found in favor of Uruguay. The arbitrators found no expropriation, and PMI was ordered to pay a portion of Uruguay’s attorney fees.¹⁷⁸

These and other ISDS actions reveal the vulnerabilities of both wealthy and less wealthy countries under the current model of ISDS. By enacting a measure apparently in the health interests of their people respective populations, these states unwittingly exposed themselves to a drawn-out arbitral battle and millions of dollars in legal fees. In PMI’s case, PMI lost against Australia, as well as Uruguay and Norway, but all claims exposed these countries to expensive legal battles. Moreover, other actions, for example

¹⁷⁶ Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 Award (July 8, 2016) at ¶ 9-12.

¹⁷⁷ See Philip Morris Asia Ltd v. The Commonwealth of Austl., UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction (2015); Philip Morris Norway AS v. the Norwegian State, represented by the Ministry of Health and Care Serv., EFTA Court, Case E-16/10, Judgment (Sept. 2011); Juliet Samuel, *The Defeat of Big Tobacco on Plain Packaging is Good for Democracy*, TELEGRAPH (May 19, 2016), <https://www.telegraph.co.uk/news/2016/05/19/the-defeat-of-big-tobacco-on-plain-packaging-is-good-for-democra/> [https://perma.cc/LB5J-BKHL]. British American Tobacco and other tobacco companies have also brought or threatened this kind of legal action against Kenya, Uganda, Namibia, Togo, Gabon, Democratic Republic of Congo, Ethiopia and Burkina Faso. See Sarah Boseley, *Threats, Bullying, Lawsuits: Tobacco Industry’s Dirty War For The African Market*, GUARDIAN (July 17, 2017), <https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market> [https://perma.cc/R2DC-H5SG].

¹⁷⁸ Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 Award (July 8, 2016) at ¶ 590.

Vattenfall v. Germany, *Ethyl v. Canada*, and *Clayton v. Canada*,¹⁷⁹ reveal the exposure of wealthy nations to these kinds of battles as well.¹⁸⁰

These actions reiterate perennial questions regarding sovereignty, regulation, and international law, which are now making their reappearance under the heading of “property.” By effectively subjecting national regulation to direct scrutiny and, to some extent, even control by investors and corporations, investment arbitration has exposed stark disparities between countries’ ability to exercise sovereign control over welfare policies and other redistributive regulations. While many countries have commitments under the WTO and other institutions and agreements to avoid certain kinds of regulation, this action exposed the power differentials between a multi-national corporation and a relatively small country. This is further illustrated when one compares Uruguay’s GDP of \$56B with PMI’s \$80B revenue/year.¹⁸¹ In other words, one might think of Uruguay and other similarly-situated countries as operating their domestic regulatory regimes under the shadow of ISDS.¹⁸²

¹⁷⁹ See Adkins & Grewal, *supra* note 165, for a discussion of *Clayton v. Canada*, a NAFTA arbitral suit against Canada for their determination a quarry in Nova Scotia could not go forward in light of the harm to the environmental and indigenous rights.

¹⁸⁰ SORNARAJAH, *supra* note 7, at 196-99, citing *Ethyl v. Canada*, 38 ILM 708 (1999) and *Vattenfall v. Germany*, ICSID, Case No. ARB/09/6, Award (Mar. 11, 2011). In the Canadian case, it was a “statement of a minister announcing a future intention regarding a measure to controlling the production of a potentially carcinogenic substance” that was seized upon by the foreign investor. See SORNARAJAH, *supra* note 7, at 196. See also Adkins & Grewal, *supra* note 165, at 66 (discussing specific instances and the context of how “developed democracies are now being targeted under a system of arbitration they had designed for use elsewhere”).

¹⁸¹ Leo Sun, *Why Is Philip Morris International Inc. Suing These Countries?*, MOTLEY FOOL (Nov. 23, 2015), <https://www.fool.com/investing/general/2015/11/23/why-is-philip-morris-international-inc-suing-these.aspx> [<https://perma.cc/DKM2-MGBE>].

¹⁸² See Cecilia Olivet & Alberto Villareal, *Who Really Won the Legal Battle Between Philip Morris and Uruguay?*, GUARDIAN (July 28, 2016), <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts> [<https://perma.cc/2H7L-S92N>] (“The arbitration panel’s decision to hear the [Uruguay] case put a brake on the adoption of similar tobacco control measures in Costa Rica, Paraguay and New Zealand, among others.”). See, e.g., TIENHAARA, *supra* note 169.

The actions also highlight the de facto asymmetry between states and multi-national corporations. They expose the potential windfalls to corporations from trade and investment treaties that include such ISDS measures. These treaties are agreed to by states, and while not always negotiated by companies, seem to operate to their benefit. Under current public international law, corporations lack personality, enabling them to avoid "accountability for wrongs [they] may commit during [their] operations."¹⁸³ In short, as Sornarajah has framed it, the multinational corporation has "rights but no responsibilities" and "wields considerable power to effect change in both domestic and international law," in part through their use of "low-order sources of international law in constructing rules favourable" to them.¹⁸⁴

Finally, in seeking injunctive relief, the PMI actions also implicate state sovereignty in that such relief would give private actors "unprecedented authority over states' traditional lawmaking powers by allowing them [private actors] to move to invalidate laws" passed in the public interest to accord with the state's own interest.¹⁸⁵ And yet, these private actors remain largely invisible as subjects of international law, in part because, as Cutler has argued, they have actively pushed for legal structures that "disembled commercial law and practice from the 'public' sphere and re-embed it in the 'private' sphere, free from democratic and social control."¹⁸⁶

Stepping back from PMI, one can discern two insights. First, focusing specifically on the transnational, border-crossing dimension of property, intellectual property appears to be the primary field to contain both the principles to frame and justify, and the doctrinal-regulatory instruments to facilitate, the global diffusion of related norms. Examining the varied histories of international and transnational intellectual property regimes¹⁸⁷ leads to further inquiries into the evolving political economies to which the regulatory regimes stand in relation, and with which they

¹⁸³ SORNARAJAH, *supra* note 7, at 21.

¹⁸⁴ SORNARAJAH, *supra* note 7, at 21. *See also* Johns 1994, *supra* note 51.

¹⁸⁵ *See* VAN HARTEN 2008, *supra* note 7; *see also* Adkins & Grewal, *supra* note 165.

¹⁸⁶ CUTLER 2003, *supra* note 48, at 13.

¹⁸⁷ *See, e.g.,* SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); ROBERT P. MERGES & SEAGULL HAIYAN SONG, TRANSNATIONAL INTELLECTUAL PROPERTY LAW: TEXT AND CASES (2018).

stand in mutually constitutive relationships. With this examination of the political complexities, the neat and linear story of a liberal extension of the individualistic¹⁸⁸ right to property into the immaterial realm is exposed as both overly-simplistic and to some degree inaccurate.¹⁸⁹

Second, one can see how over time, the nature of the protection of investors' property has shifted in at least three ways. First, the idea of what is protected—what constitutes an “investment”—has shifted towards intangible property involving “rights of control through shareholdings rather than ownership”¹⁹⁰ and “goodwill or intellectual property or holding companies and short-term capital flows.”¹⁹¹ Second, what that investment is protected *from* has expanded as well, and now includes the potential for protection against environmental, health, price, export-related, or industrial regulations that might decrease the future profits of corporations. It also includes protection against “administrative control mechanisms” such as licensing provisions.¹⁹² Finally, the remedies offered have expanded as well. As “compulsory arbitration lead[s] to a damages award rather than more conventional public law remedies,”¹⁹³ this shift now allows petitioners in this case to seek both injunctive relief and pecuniary damages.

It is also worth noting the entrance of new laws shaped by encounters across jurisdictional borders. Here what *is* property and the nature of protective regimes around it have been transformed not only because of the transnational encounters between investors and *states*, but also between those actors and *localities* through the

¹⁸⁸ See C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962).

¹⁸⁹ For an intriguing history of narratives of imperialism, colonization and exploitation in the assertion of intellectual property rights, see SHIVA, *supra* note 32; see also Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection*, 6 *IND. J. GLOB. LEGAL STUD.* 2 (1998).

¹⁹⁰ SORNARAJAH, *supra* note 7, at 199-200 (explaining the difficulty in evaluating the nature of protection for shareholders).

¹⁹¹ Van Harten 2005, *supra* note 164, at 604.

¹⁹² SORNARAJAH, *supra* note 7, at 200.

¹⁹³ Van Harten 2005, *supra* note 164, at 604. For the seminal treatment of the intersection of tort and property with regard to remedies, see Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

multiple forms of resistance with which communities have engaged.¹⁹⁴

Moreover, the effects of this new regime are far-reaching in scope. For example, in contrast to the strengthening of property rights for some actors, multi-pronged strategies to attract foreign investors have also led to land grabs and the displacement of many communities across many countries in Africa.¹⁹⁵ In relation to changes of the law to accommodate investors in mining in Mali, but with insight that applies elsewhere as well, Hatcher argues that the government has shifted from "owner/operator" to regulator to "facilitator of foreign investment."¹⁹⁶ The nature of the control ceded here is wider than just with regard to the new mining code, but rather "redefines" a new role of the state.¹⁹⁷ In Mali and in other places, while this legal reform did spur gold mining and public revenue, the rights of village residents were left behind. The land that villagers had occupied has been delivered to the foreign mining companies,¹⁹⁸ food has become scarcer and more expensive,¹⁹⁹ and resources have not been re-distributed.²⁰⁰ Despite being the third largest producer of gold in Africa, "one in five Malians live in extreme poverty."²⁰¹ Implicit here is the state's valuing of putting

¹⁹⁴ See LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura De Sousa Santos & César Rodríguez-Garavito eds., 2005); RAJAGOPAL 2003, *supra* note 65.

¹⁹⁵ For example, in 1991 and 1999, with support by the World Bank, Mali "revised mining legislation to make the country more attractive to foreign companies." COTULA, *supra* note 5, at 89. This included numerous tax revisions, streamlining of licensing, and also guaranteeing security of mineral title. Pascale Hatcher, *Mali: Rewriting The Mining Code Or Redefining The Role Of The State*, in REGULATING MINING IN AFRICA: FOR WHOSE BENEFIT? 39, 43-46 (Bonnie Campbell ed. 2004).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ COTULA, *supra* note 5.

¹⁹⁹ *Oxfam in Mali*, OXFAM (2012), <https://www.oxfam.org.uk/what-we-do/countries-we-work-in/mali>. [<https://perma.cc/H2BD-GMPB>].

²⁰⁰ OXFAM, HIDDEN TREASURE: IN SEARCH OF MALI'S GOLD-MINING REVENUES (2007), <https://www.oxfamamerica.org/static/media/files/hidden-treasure.pdf> [<https://perma.cc/PCL6-ZM9P>].

²⁰¹ *For Many Malians, Especially Those Uprooted by Conflict, Life is Fragile*, RELIEFWEB (Oct. 16, 2013), <https://reliefweb.int/report/mali/many-malians-especially-those-uprooted-conflict-life-fragile> [<https://perma.cc/RRN6-M62T>]. See also OXFAM, MALI: A NEW DEVELOPMENT CONTRACT? (2013), <https://oi-files-d8->

land to work towards its apparent highest use, which is no longer subsistence agriculture in this example, but mining. Moreover, across land grabs, one can observe the continuation of the narrative around “empty land” as a way to invite and entice investors.

3. METHODOLOGY: SEEING PROPERTY THROUGH TRANSNATIONAL LAW

From the relationship of conquest and imperialism to the more recent methods of attracting foreign capital, the material influence of transnational actors and ideas on the form and content of property regimes has been powerful. Different conceptions of property have been generated by the encounters described above. A transnational approach to studying property turns our attention not just to the actors, but also to the larger ideas regarding the nature of “law” itself that crossed borders, took hold, and was adapted and implemented.

What follows is a discussion of four lenses through which a transnational analysis of property may be approached: the “diffusion of law,” the plurality of law and its constituent norms, postcolonial “everyday lived experiences” of urban property, and law’s proliferation in terms of norm creation and norm implementation beyond the state. This list is not exhaustive, but rather, is meant to be suggestive of ways of analyzing how property operates in particular geographies and eras, how dominant forms of property regimes came to be and the implications for their transplantation, and how the exercises of sovereignty that are entwined with property can be revealed and scrutinized.

prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/bn-mali-new-development-contract-150513-en_2.pdf [https://perma.cc/XZV7-X2YN]. As of 2008, IMF still pushed for better property rights for investors. INT’L MONETARY FUND, MALI: SELECTED ISSUES: IMF COUNTRY REPORT, NO. 08/286. (Aug. 2008), <https://www.imf.org/external/pubs/ft/scr/2008/cr08286.pdf> [https://perma.cc/34UZ-VUNF].

3.1. *The Diffusion of Transnational Property*

Appreciating the complex ways in which particular ideas in property travelled and took hold in various geographies²⁰² means not only seeing connections between property regimes that came into contact with each other, but also how global (and ongoing) moments of conquest, colonialism, development, and investment processes shape conceptions of what constitutes property and who gets to hold it. Diffusion worked differently in each of the phases above. While in the discussion of conquest and colonialism, the acts of *states* in the development of jurisprudence was observed; in the turn to investment law, the power of *private actors* to make law in closed, private arbitral settings was observed. Against this backdrop, the question arises of how the connections between property regimes—the travels and comingling of resources and capital, people, and ideas that change how property is lived—can be appreciated without reducing heterogeneous regimes into one universal story of orthodox thinking in property. How should one examine, consider, and compare, similarities, differences, influences and mutual constitution without telling a story of inevitable convergence towards Western conceptions of property rights? In other words, does focusing on the “flow of capital” and the rising power of private actors open up to risk of telling one universal story of capital and property—that of imposition of Global North acting on the Global South through colonies and spaces of development and investment?

Postcolonial scholar Dipesh Chakrabarty unpacks the hidden universalism in narratives of global capital,

No historical form of capital, however global its reach, can ever be a universal . . . The universal, in that case, can only exist as a place holder, its place always usurped by a historical particular seeking to present itself as the universal

Histories of capital, in that sense, cannot escape the politics of the diverse ways of being human. Capital brings into

²⁰² See, e.g., William Twining, *Diffusion and Globalization Discourse*, 47 HARV. INT'L L.J. 507 (2006); DAVID A. WESTBROOK, NAVIGATORS OF THE CONTEMPORARY: WHY ETHNOGRAPHY MATTERS (2009).

every history some of the universal themes of the European Enlightenment, but on inspection the universal turns out to be an empty placeholder whose unstable outlines become barely visible only when a proxy, a particular, usurps its position in a gesture of pretension and domination.²⁰³

In short, then, the “globalization of capital is not the same as capital’s universalization.”—meaning that the existence of globalization is not an indication that the “universal and necessary logic of capital,” per Marx has been realized.²⁰⁴ Rather, “singular and unique histories” continue to “interrupt” and “defer” capital’s “self-realization” and in doing so, serve as “grounds for claiming historical difference.”²⁰⁵

Similarly, liberal conceptions of property regimes may look universal, monolithic, neutral,²⁰⁶ or coherent²⁰⁷ or are often presented as such.²⁰⁸ But, in fact, what is revealed upon an examination of the processes of property regime formation is that that image of monolithic property is a myth. Laws and norms have changed with time and place, have been adapted to fit the circumstances in which they were meant to serve. Often, they have served to perpetuate the interests of the stronger class of parties. This recognition of historical contingency—of *choice* in how property regimes are conceptualized—also reveals the double role²⁰⁹ that property can play, both enfranchising and disenfranchising, simultaneously.

How then can one decenter that myth of universality and coherence—and inevitability—in an account of the seemingly apparent diffusion of property law across the globe? Focusing the

²⁰³ CHAKRABARTY, *supra* note 112, at 70.

²⁰⁴ CHAKRABARTY, *supra* note 112, at 71.

²⁰⁵ CHAKRABARTY, *supra* note 112, at xvii, 71.

²⁰⁶ See CUTLER 2003, *supra* note 48, at 14.

²⁰⁷ See FITZMAURICE, *supra* note 82 (attributing the expansion of certain forms of common law to “cohering power of ideology,” which was needed to exercise force (and for our purposes, property claims) over long distances).

²⁰⁸ For example, in the purported “best practices” in development orthodoxy or investor protection practices explored above.

²⁰⁹ On law’s double role, see Robert A. Kagan, Bryant Garth, & Austin Sarat, *Introductory Essay: Facilitating and Domesticating Change: Democracy, Capitalism, and Law’s Double Role in the 20th Century*, in LOOKING BACK AT LAW’S CENTURY (Austin Sarat, Bryant Garth, & Robert A. Kagan eds., 2002).

analysis on the historical contingencies of *specific* property doctrines and their legal *technologies* might enable the beginning of deconstructing the mythology around strong universal property rights. Such technologies include the use of (i) formality, title, and land records to attract capital from another jurisdiction,²¹⁰ (ii) individual ownership and privatization in the name of progress,²¹¹ and (iii) land use and zoning to attract or maintain wealth—and even the status of certain national²¹² or racial groups²¹³—within jurisdictions. Each of these technologies have traveled well outside their original spheres of influence and served many different interests in their journeys.²¹⁴ Seeing property this way forces the reconsideration of technologies that look technical and neutral as technologies that have in fact perpetuated exclusion. It helps people see how many property concepts emerged in certain moments to protect then-present constellations of power and that were then entrenched through time by codification into law and transplantation elsewhere, with their history left behind.

Here, tracing the flows of capital, people, and ideas does not mean a turn of gaze from domestic contexts into a white abstract space somehow detached from the nation-state. In recognizing the multi-sited origins and re-shapings of property concepts, it is also important to acknowledge the interplay between multiple domestic contexts. This interplay lies at the heart of transnational law formation and involves shifting assemblages of actors and institutions, events, ideas, norms, and processes. As such, transnational property law regimes are constituted as well by the flows of capital and people between them, from which regulatory claims are made and begin to take shape. Recognizing the dialectic between global and local, and the interactions between multiple “local sites” can reveal much about how law changes, and how it

²¹⁰ See Gupta 2014, *supra* note 21.

²¹¹ See discussion of the taking of indigenous land in *supra* Part I.

²¹² See McAuslan 2015, *supra* note 39.

²¹³ Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

²¹⁴ For example, while it was shown above that property regimes designed to attract foreign capital can be problematic enough, it should also be noted that the formalization of property ownership through land titling programs has also been used to both entrench gendered inequality of ownership, as well as to try to alleviate it.

reflects underlying societal values. From there, one might see not just how materials things—capital, resources—flow among geographies, but also how ideas and ways of life (and therefore legal norms) are transformed through transnational travels, encounters, and conflicts.

3.2. *Plural Property*

In recognizing the complexity of the diffusion of law globally, engaging with the plurality of regimes and the multiplicity of sources, as well as scales of legal relations, becomes crucial. In proceeding in the project of developing a conceptual framework for transnational property law, one enters into the realm where legal doctrine not only meets and engages the sociology of law and legal anthropology, but where one, in fact, discover that doctrine and principle do not exist in complete isolation from the way in which social sciences describe and scrutinize legal forms of ordering. After investigating property's transnational birth and evolution in old and new conflictual encounters, this Article can now draw on social sciences to help understand the nature, the consistency, and the dynamics of the transnational property law regimes that it has been tracing. That this undertaking is echoed in concurring scholarly efforts to revive and to reconceptualize theories of governance,²¹⁵ legal pluralism,²¹⁶ and legal geography,²¹⁷ is not surprising.

William Twining captures this endeavor as follows:

In law, it is especially important to distinguish between different geographical levels of human relations and of legal ordering of these relations—from outer space to the very

²¹⁵ THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

²¹⁶ See, e.g., Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009); Paul Schiff Berman, *Global Legal Pluralism*, 80 CAL. L. REV. 1155 (2006); Balakrishnan Rajagopal, *The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle In India*, 18 LEIDEN J. INT'L L. 345 (2005).

²¹⁷ THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas Blomley, David Delaney, & Richard T. Ford eds., 2001); THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY (Irus Braverman, Nicholas Blomley, David Delaney, & Alexandre Kedar eds. 2014).

local, including intermediate levels, such as regions, empires, diasporas, alliances, and other multinational entities and groupings. These levels are not neatly nested in concentric circles nor in hierarchies, nor are they static nor clearly defined. A reasonably inclusive cosmopolitan discipline of law needs to encompass all levels of legal ordering, relations between these levels, and all important forms of law including supra-state (e.g. international, regional) and non-state law (e.g. religious law, transnational law, chthonic law i.e. tradition/custom and various forms of 'soft law').²¹⁸

"[I]f one is concerned with legal ordering at all levels from the very local to the intergalactic, including non-state local, regional, transnational, and diasporic then clearly borrowing, blending, and other forms of interaction can take place at all levels and between different levels; interaction can be vertical, horizontal, diagonal, or involve more complex pathways"²¹⁹

Thinking about this concept of law against the examples presented in Part II, it becomes even clearer how property regimes are plural and spatial in nature. A fitting conceptual framework exists in the form of legal pluralism, which the legal anthropologist Sally Engle Merry defines as "a situation in which two or more legal systems coexist in the same social field."²²⁰ Postcolonial theory, with its recognition of the multiplicity of legal regimes simultaneously governing, offers an understanding of plurality that engages with the complex entanglement of legal systems—not only are they operating simultaneously but they also are mutually constitutive.

Postcolonial theorists also offer understandings of how law and norms emanate from non-state actors through a multiplicity of processes. In that vein, the legal sociologist Boaventura de Sousa Santos conceives of "the phenomenological counterpart of legal pluralism" through the introduction of a concept of "interlegality," defined as "the conception of different legal spaces superimposed,

²¹⁸ William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM 11 (2004).

²¹⁹ *Id.* at 13 [internal citations omitted, emphasis added.]

²²⁰ Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988) (internal citations omitted).

interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life.”²²¹ By employing the concept of interlegality, one sees, for example, not only the production of law through colonial encounters, but also are able to carry forward that encounter as an ongoing moment of law creation, diffusion,²²² and transformation in our legal analysis.

From there, a world view comes into view—both geographically, and across time—not a universalistic conception of one legal regime but rather, a global or transnational legal pluralistic sense of the larger geographic and societal frames that are relevant to legal analysis. Property regimes, as noted in the opening of this Article, are not just based ‘locally’ or in one nation-state, as evidenced by the overlapping spheres of pluralistic legal systems and jurisdiction. This implies that instead of studying legal regimes or even legal pluralism within a state context, one should appreciate a global vision of multiple legal systems interacting and forming laws and norms through those encounters and from images of governance coming from both “below”²²³ as well as “above”.²²⁴

As the lived experiences of people around property, in particular, demonstrate, the multiple regimes that govern may be ‘official’ or ‘unofficial’, formal or informal, written or not written—coming from the state or not. Indeed, for legal pluralists, even “[s]tate law itself is multiple.”²²⁵ As Martha-Marie Kleinhans and Roderick A. Macdonald explain, this “multiplicity is both internal

²²¹ Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & Soc’y 279, 297-98 (1987).

²²² Note that from this view, that diffusion would be multi-directional and nonlinear. See EVE DARIAN-SMITH & PHILIP C. MCCARTY, *THE GLOBAL TURN: THEORIES, RESEARCH DESIGNS, AND METHODS FOR GLOBAL STUDIES* (2017) (discussing methods of global research and advocating a holistic approach to understanding contemporary global issues).

²²³ Sousa Santos & Rodríguez-Garavito, *supra* note 194; RAJAGOPAL 2003, *supra* note 65.

²²⁴ See, e.g., Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005) (arguing that contemporary pluralist imaginations are based on a limited view of the law and proposing an alternative image of law).

²²⁵ Martha-Marie Kleinhans & Rod A. Macdonald, *What is a Critical Legal Pluralism?*, 12 CAN. J.L. & SOC. 25, 31 (1997).

and external.”²²⁶ Internally, it can be found in “unitary systems that referentially incorporate local custom and commercial practice as part of the official legal regime in explicitly federal systems” as well as “where diverse administrative agencies compete with each other and with different judicial bodies to regulate conduct[.]”²²⁷ Externally, multiplicity arises “in every situation involving what jurists conventionally label “choice of law” in the conflicts of laws,” operating through “multiple bodies of law, with multiple institutional reflections and multiple sources of legitimacy.”²²⁸

In the examples above, that multiplicity comes not just from interactions of conflicting property law regimes, but also from the intersection of property, international law, finance, immigration, and regimes of other sovereigns.²²⁹ Each of these features are found in multiple forms within the nation-state, between nation-states, and crucially, from the actions and norms held by non-state corporate, civil society, and local and global entities and actors. One can see through the examples of investment law and property rights, how, while the boundaries between practice areas may be breaking down, there is also increased fragmentation²³⁰ and the rise of highly specialized regulatory constellations.²³¹

3.3. *Everyday Lives of Urban Property in the Global South*

This leads to the third implication of this globalized orientation: the opening of theoretical space in which to rethink property regimes in terms of their origins and evolution, their “life” and

²²⁶ *Id.* at 31.

²²⁷ *Id.* at 31.

²²⁸ *Id.* at 31-32 (internal citations omitted). On objections to the move away from state law and fears for the Rule of Law, see *id.* at 32-34.

²²⁹ JOHN BORROWS, CANADA’S INDIGENOUS CONSTITUTION (2010) (discussing the nature and sources of Canadian law and determining that the Canada’s constitution is incomplete without further inclusion and acceptance of Indigenous legal traditions); John Borrows, *Indigenous Legal Traditions in Canada*, 19 WASH. U. J.L. & POL’Y 167 (2005) (recognizing Canada’s need to more effectively recognize Indigenous legal traditions).

²³⁰ On the fragmentation of public international law, see Martti Koskenniemi & Päivi Leino, *Fragmentation of international law? Postmodern Anxieties*, 15 LEIDEN J. INT’L. L. 553 (2002).

²³¹ See Zumbansen 2012, *supra* note 24, at 191.

functional dimensions “in action.”²³² Moving from historical examples of encounters forward, this Section sets out to locate the sites of conflicts over property in the City.

Cities—where property claims to scarce resources play out with a particularly high pitch and where the investment flows discussed above are landing unevenly around the world—are fascinating and intriguing regulatory and epistemic spaces in that regard,²³³ particularly through the analytical lenses offered by urban sociologists studying cities in the Global South or “from the South.”²³⁴

This literature can be seen as part of broader methodological and normative efforts to re-think an array of disciplinary and theoretical frameworks and “from the South.”²³⁵ As Ananya Roy has argued, First World conceptions of cities are so inadequate for Third World cities that it is not that they need reconfiguring, but that the episteme itself should be informed by the experiences of the Third World, as

²³² Roscoe Pound, *Law in Action and Law in Books*, 44 AM. L. REV. 12-36 (1910) (discussing the divergence between legal theory and the practical application of black-letter law).

²³³ As Coll Thrush points out in his immensely readable and informed account of indigenous life in London, cities are also places that are seen as having little Indigenous “presence and even less significance,” and so have been used to reinforce historicist and racist binaries of modern/not modern. See COLL THRUSH, *INDIGENOUS LONDON: NATIVE TRAVELERS AT THE HEART OF EMPIRE* (Yale U. Press, 2016). In the past several decades, the “Global City” paradigm has come to prominence. The Global City, often associated with Saskia Sassen, refers to “a set of global command and control centers that are connected in transnationally networked hierarchies of economic, demographic and sociocultural relationships.” SASKIA SASSEN, *GLOBAL CITY 4* (Princeton U. Press 2d ed. 1991). That paradigm has been invaluable in demonstrating how these transformations, regulation, information, capital, and production processes have to be understood as global processes subject to multi-layered regulatory regimes and with uneven spatialized landings. Moreover, studying the City against this political economic background further reveals the state’s growing reliance on private authority as it seeks to create an ever more amenable playing field for global investors, while significantly weakening democratic forms of accountability on local, national and global levels. On the idea of “private authority,” see A. Claire Cutler et al., *The Contours and Significance of Private Authority in International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS*. (A. Claire Cutler, Virginia Haufler, & Tony Porter eds., 1999).

²³⁴ See, e.g., Jennifer Robinson & Ananya Roy, *Debate on Global Urbanisms and the Nature of Urban Theory*, 40 INT’L J. URB. & REG’L RES. 181 (2016) (discussing the decentralization and reframing of the concept of the urban space).

²³⁵ Jean L. Comaroff & John Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa*, 22 ANTHROPOLOGICAL F. 113 (2012).

well as the First.²³⁶ In these accounts, the Global South is not just as a place that was acted upon by colonial and other Global North forces, but rather as a diverse constellation of locations that *generate* theoretical categories. In that sense, this literature both affirms and critiques the concept of the Global City by revealing the diversity of modes of city participation in the global economy.²³⁷

From the project of building an understanding of transnational property, this re-orientation of research could mean engaging with a plurality of property regimes as they operate in people's everyday lives, particularly those living in cities in Global South. This approach could help reveal the flows of resources, power imbalances, and perpetuation of colonial logics,²³⁸ all of which demonstrate how property has been conceived and how transnational encounters have been instrumental in that conception. What follows are several brief illustrations of the categories and frameworks that might be re-thought in relation to property.

Perhaps not entirely surprising given the massive development projects of the previous several decades, many of these urban sociological engagements encourage new thinking around the concept of 'infrastructure'. For example, Swati Chattopadhyay, writing about Indian cities with particular reference to Calcutta, reconceptualizes infrastructure to include popular *uses* of city spaces (such as cricket and religious ceremonies). These uses are re-read in her account as political expressions.²³⁹ In a comparable vein, but with focus on African cities, Ambreena Manji explores what might constitute an effective 'right to the city' in the context of the uneven

²³⁶ Ananya Roy, *Who's Afraid of Postcolonial Theory?*, 40 INT'L J. URB. & REG'L RES. 200, 202 (2016) (arguing that Eurocentrism in discussions of the urban space precludes multiple concepts of "the urban" and other understandings of political economy). See also Ananya Roy, *The 21st-Century Metropolis: New Geographies of Theory*, 43 REG'L STUD. 819 (2009) (discussing Eurocentrism in dominant theories about global city-regions and the consequential exclusion of "metropolitan modernities").

²³⁷ For a seminal critique of the concept of Global Cities and an alternative conception of the place of cities in global economic structures, see JENNIFER ROBINSON, *ORDINARY CITIES: BETWEEN MODERNITY AND DEVELOPMENT* (Routledge 2006).

²³⁸ See LAWS OF THE POSTCOLONIAL (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

²³⁹ See SWATI CHATTOPADHYAY, *UNLEARNING THE CITY: INFRASTRUCTURE IN A NEW OPTICAL FIELD* (U. of Minn. Press 2012) (questioning the traditional concept of the urban space and advocating for the need for a new urban vocabulary).

benefits and inconveniences of highway construction in Nairobi.²⁴⁰ AbdouMaliq Simone writes of the remaking of infrastructure and space through mixed uses of land—in his words, “improvised livelihoods in mixed-up districts”—and interdependence and isolation in Jakarta.²⁴¹ With reference to Johannesburg, he reconceptualizes infrastructure as people—infrastructure in this case being the flexible, creative, and resourceful economic collaborations among otherwise marginalized residents that, like more the more traditional sort of infrastructure, serve as “a platform providing for and reproducing life in the city.”²⁴²

These projects raise numerous questions for the responsiveness²⁴³ of property regimes—those that are established in these jurisdictions as well as those on the ‘outside’ that interact with them. Decisions around who gets to have a say in the built environment—in the spaces that order daily life for societies—involve often procedural and technical local governmental forms of governance. Decisions around who *should* have access to that built environment—in short, for whom it is built—find their outcomes’ codification in property regimes. Decisions around who *will* have access to that built environment—around how title and rights to use built environments will be allocated—may involve seemingly mundane applications of formal property law, but this Article has shown how the colonial and conquest legacies valuing a hierarchy of uses of space remain powerfully imprinted in current property thought.

Infrastructural growth—material and re-imagined—is of course just one dimension of the massive transformations undergone by cities in the Global South in the past few decades. Other dimensions

²⁴⁰ See Ambreena Manji, *Bulldozers, Homes and Highways: Nairobi and the Right to the City* 42 REV. AFR. POL. ECON. 206 (2015).

²⁴¹ See ABDOUNMALIQ SIMONE, *CITY LIFE FROM JAKARTA TO DAKAR: MOVEMENTS AT THE CROSSROADS* (Routledge 2010) (challenging the traditional analyses of urban life by focusing on cities in Africa and South East Asia, notably Chapter four).

²⁴² AbdouMaliq Simone, *People As Infrastructure: Intersecting Fragments In Johannesburg*, 16 PUB. CULTURE 407, 407-08 (2004).

²⁴³ PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (Transaction Publishers 1978) (discussing jurisprudential issues in a social science project). On reflexivity, see Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC. REV. 239 (1983); Peter Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008).

include the rise of middle classes²⁴⁴, their notable heterogeneity, massive urbanization,²⁴⁵ and the ensuing displacement and forced evictions.²⁴⁶ Each of these dimensions brings with them new ways of life that are often structured in some way by property regimes and transactions—whether through consumerism, new household configurations with new homes to match,²⁴⁷ or new patterns of labour and transport as well as access to resources²⁴⁸ and daily security of life and livelihoods. These transformations have driven the reconceptualization of cities and the idea of the urban,

²⁴⁴ Homi Kharas, *The Emerging Middle Class in Developing Countries*, OECD DEVELOPMENT CENTRE WORKING PAPERS (2010), <https://www.oecd-ilibrary.org/docserver/5kmmp8lncrns-en.pdf?expires=1579799888&id=id&accname=guest&checksum=530556FC487DC7DD2E91241E7C97C73> [https://perma.cc/2AX4-PME2] (examining the establishment of the middle class in developing countries, specifically, the role of the middle class in current economic thought); Moses Naim, *The Uprising of the Global Middle Class*, ATLANTIC (Aug. 25, 2017) (discussing the economic impact of the rise of the middle class in developing countries); On the global middle class, situated from Morocco, see S. COHEN, *SEARCHING FOR A DIFFERENT FUTURE: THE RISE OF A GLOBAL MIDDLE CLASS IN MOROCCO*. (2004). Regarding Jakarta, see AbdouMaliq Simone, *Cities Of Uncertainty: Jakarta, The Urban Majority, And Inventive Political Technologies*, 30 THEORY, CULTURE & SOC'Y 243 (2013). Regarding Latin America, see Francisco H. G. Ferreira, Julian Messina, Jamele Rigolini, Luis-Felipe Lopez-Calva, Maria Ana Lugo, & Renos Vakis, *Economic Mobility and the Rise of the Latin American Middle Class*, WORLD BANK PUBLICATIONS (2012), https://pdfs.semanticscholar.org/1c5f/6dc583aef0d314312790c4ff00c22140d86b.pdf?_ga=2.256296139.1528751496.1579800024-1657322843.1579800024 [https://perma.cc/WH4N-DE4Q]; LATIN AMERICA'S EMERGING MIDDLE CLASSES: ECONOMIC PERSPECTIVES (J. Dayton-Johnson ed., 2015). On the uncertainty associated with these transformations, again see Moses Naim, *The Uprising of the Global Middle Class*, ATLANTIC (Aug. 25, 2017); see also MIKE DAVIS, *PLANET OF SLUMS* (2006).

²⁴⁵ See generally THE NEW BLACKWELL COMPANION TO THE CITY (Gary Bridge & Sophie Watson eds., Wiley-Blackwell 2011) (discussing the impact of increased urbanization); Neil Brenner & Christian Schmid, *Planetary Urbanization*, in URBAN CONSTELLATIONS (M. Gandy ed., 2012) (arguing that within the context of urbanisation, political-economic spaces should not be treated as discrete and distinct types of settlement).

²⁴⁶ See GAUTAM BHAN, *IN THE PUBLIC'S INTEREST: EVICTIONS, CITIZENSHIP, AND INEQUALITY IN CONTEMPORARY DELHI* (U. of Ga. Press 2016) (discussing planned illegalities, spatial illegality and evictions and the politics of governance in contemporary Delhi).

²⁴⁷ For example, in India, the rise of nuclear family households.

²⁴⁸ See NIKHIL ANAND, *HYDRAULIC CITY: WATER AND THE INFRASTRUCTURES OF CITIZENSHIP IN MUMBAI* (2017); see also SIMONE 2010, *supra* note 241 (discussing a resourceful daily life in the face of "carbon-driven exigencies of infrastructural transformations," opening up possibilities for the remaking of societal relationships and politics in egalitarian ways).

particularly in the Global South, as “megacities,” “world”/“world-class,”²⁴⁹ “spectacular,”²⁵⁰ “ordinary,”²⁵¹ “entangled,”²⁵² “bourgeois,”²⁵³ “hydraulic,”²⁵⁴ “slumdog,”²⁵⁵ “yet to come,”²⁵⁶ and as sites of “pirate modernity,”²⁵⁷ to name a few.

Who—or what—is governing these societal, economic, and political transformations and their implications for the use of city space? As the accounts in Part II and the discussion of diffusion and plurality above attempted to demonstrate, sites of governance—and therefore sites of agency—are diffuse and overlapping. Such sites can often be found in a constellation of state, sub-state, and non-state actors from communities to professional groups to civil society groups. It has also been shown how the governance of given fields of law is dependent on ever-evolving webs of various fields of law and regulation. In property’s case, for example, investment, development lending, immigration, and finance operate simultaneously on different scales of jurisdiction—local, national, transnational, with ongoing translation, adaptation, and fusion between them.²⁵⁸

²⁴⁹ See WORLDING CITIES: ASIAN EXPERIMENTS AND THE ART OF BEING GLOBAL (Ananya Roy & Aihwa Ong eds., 2011).

²⁵⁰ See IPSITA CHATTERJEE, SPECTACULAR CITIES: RELIGION, LANDSCAPE, AND THE DIALECTICS OF GLOBALIZATION (2016).

²⁵¹ See Robinson & Roy 2016, *supra* note 234.

²⁵² See SANJAY SRIVASTAVA, ENTANGLED URBANISM: SLUM, GATED COMMUNITY, AND SHOPPING MALL IN DELHI AND GURGAON (2015).

²⁵³ See PARTHA CHATTERJEE, *Are Indian Cities Becoming Bourgeois At Last?*, in THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD 131 (2004).

²⁵⁴ See ANAND, *supra* note 248.

²⁵⁵ See Ananya Roy, *Slumdog Cities: Rethinking Subaltern Urbanism*, 35 INT’L J. URB. & REG’L RES. 223, 225 (2011).

²⁵⁶ See ABDOUMALIQ SIMONE, FOR THE CITY YET TO COME: CHANGING AFRICAN LIFE IN FOUR CITIES (2004).

²⁵⁷ See RAVI SUNDARAM, PIRATE MODERNITY: DELHI’S MEDIA URBANISM (2010).

²⁵⁸ For a gripping journalistic narrative of the self-governance of a slum in Bombay in the context of urbanization, construction, and increased official security state, see KATHERINE BOO, BEHIND THE BEAUTIFUL FOREVERS: LIFE, DEATH, AND HOPE IN A MUMBAI UNDERCITY (photo. reprt. 2014) (2012). For a rich account of the transformations of the idea of the local—in this case Bogota—within constellations of international law and development policy, see LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (2015).

More specifically, then, how has the governance of urban property in cities in the Global South transformed in this context of globalization? Sketching a picture of sites of governance of space and of who has access to which city spaces and for what purposes is necessarily complex. For example, in writing about Calcutta, Partha Chatterjee tells of the changing nature of neighborhood public spaces and institutions—parks, tea shops, markets and much more—established by the wealthy and middle classes in the 1950s, and often very diverse in terms of class, religion, language and ethnicity.²⁵⁹ Poorer residents lived in close quarters with the wealthy, sharing patron-client relationships, often working in industrial factories owned by the wealthy.²⁶⁰ Democracy and development projects of the 1970s and 80s brought a number of accommodations to alleviate urban poverty, including improved access to sanitation, education, and healthcare for poorer residents.²⁶¹ However, with post-industrialization and the increasing disengagement of the middle classes from urban politics, these neighborhoods have become much more segregated—by class as well as religion/language/ethnicity—and much more disinclined to support the lives and livelihoods of various classes and interests.²⁶² These changes are reflected in property and land-related law, as wealthy and middle classes increasingly bring actions to move poor residents away from what they perceive as *their* living spaces and resources.²⁶³ The poor, while having increased access to some forms of social welfare at times, had never been treated as full citizens with respect to their access to property or neighborhood space, as it evidently would have threatened “the entire structure of legally held property.”²⁶⁴ And so, even while the poor sometimes gained access to some facilities and benefits through ongoing negotiations with separate government agencies and on a case-by-case basis, such access was not regularized across

²⁵⁹ See Chatterjee 2004, *supra* note 253, at 133.

²⁶⁰ See Chatterjee 2004, *supra* note 253, at 132.

²⁶¹ See Chatterjee 2004, *supra* note 253, at 135.

²⁶² See Chatterjee 2004, *supra* note 253, at 139-142.

²⁶³ See Chatterjee 2004, *supra* note 253; see also Gupta 2014, *supra* note 21.

²⁶⁴ Chatterjee 2004, *supra* note 253, at 137. For a discussion around cloudy land title in India with regard to all socio-economic classes, see Priya S. Gupta, *Ending Finders, Keepers: The Use of Title Insurance to Alleviate Uncertainty in Land Holdings in India*, 17 U.C. DAVIS J. INT'L L. & POL'Y 63 (2010).

populations, so as to prevent “jeopardizing the overall structure of legality and property.”²⁶⁵ That lack of recognition of the poor as rights-bearing citizens has enabled the judiciary more recently to sanction the clearance of slums and residents who live on pavement and in encampments with little alternative accommodation.²⁶⁶

This account further highlights the need for a relevant account of law to go beyond purported formality to appreciate the degree of informality and plurality that governs the “regime” in question. It is here again that an understanding of “property law” requires one to draw on socio-legal accounts and on ethnographies of “everyday lives” to effectively understand societal ordering with, through and around property. With the help of more differentiated, interdisciplinary tools it becomes possible to gain an understanding of who actually has access to ownership, who in reality gets to hold title and makes decisions regarding land within households,²⁶⁷ and what the true circumstances are around gender access to ownership and use. Based on a differentiated, ethnographically-based critique, it might be a better position to assess what kinds of uses are prioritized in different, specialized, and increasingly fragmented regulatory areas. Finally, it might allow a clearer picture of the underlying demographics, and which populations have security of use of city space and, crucially, how this changes over time. In an effort to better understand the shifting constellations of actors who exercise agency around property, this would also prompt a look at policy and legal entrepreneurs who shift ownership patterns and access to resources. Examples of such entrepreneurs might include title aggregators who work to assemble large plots of land ready for re-development, immigration lawyers who work to secure visas in exchange for investment from abroad, or others who fulfill similar societal positions.

The account also highlights the need to engage with multiple fields and regulatory areas at the same time, and against the background of larger political-economic and societal

²⁶⁵ Chatterjee 2004, *supra* note 253, at 137.

²⁶⁶ See Gupta 2014, *supra* note 21.

²⁶⁷ On the legal nature of the household, see ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* (2008). For a critical account situated during the Greek debt crisis of 2010, see Philomila Tsoukala, *Household Regulation and European Integration: The Family Portrait of a Crisis*, 63 AM. J. COMP. L. 747 (2015).

transformations. Evolving priorities and values involving property are, at the very least, found within the following regulatory areas: foreign investment (including who can invest in real estate and in what forms real estate can be built; tax and tax credits; local governance and regulations), zoning, sanitation, utilities (including the politics of which residents get access to reliable water and electricity), the use of law to treat homeless populations as “nuisance”²⁶⁸ or “illegal”²⁶⁹, who gets to serve on local councils, property sales and transactions (the process of assigning and registering title, mortgage and insurance), inheritance, and the nature of constitutional rights involving property and the politics around their exercise.

What does this account do to liberal property theory and its reliance on formality, records, delineated and individual ownership and separation of uses by space? This account presents its own theory, grounded in its own experiences. It also offers a powerful critique to the often-assumed universality of common law property. In short, and in reference to the historical moments and property doctrines presented in Part II, it puts pressure on the reality of such concepts as formality and title; just exercises of land appropriation and eminent domain; the implicit hierarchy in the concept of ‘use’; individual ownership and rights; and the exercise of sovereignty over space and residents; as well as entitlements that accompany invasion and occupation. It also raises broader questions around how law comes into being, who exercises agency, whose interests are represented and why and how property is actually used and understood.

²⁶⁸ See generally D. ASHER GHERTNER, *RULE BY AESTHETICS: WORLD-CLASS CITY MAKING IN DELHI* (2015) (discussing the treatment—and non-treatment—of homeless populations by government officials in formal and informal actions).

²⁶⁹ See Usha Ramanathan, *Illegality and The Urban Poor*, 41 *ECON. & POL. WKLY.* 3193 (2006) (tracking the shift of the judiciary in classifying the urban poor’s housing crisis as an issue of legality as opposed to one of fundamental rights). For a powerful account of the “criminalization of poverty” in the United States, see Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. CRIM. L. & CRIMINOLOGY* 643 (2009).

3.4. *Actors and Encounters (and even Law) Beyond the State*

[T]he state has lost its exclusive role in the global sphere. It has not become unimportant—some states have arguably increased their power and their importance—but it has lost its independence. States have become, to use concept that Keohane and Nye popularized, interdependent; their role depends on and in turn influences that of other states, and much of their activity now happens in cooperation with other states . . . [I]t matters also that states have become disaggregated, as Anne-Marie Slaughter has demonstrated—rather than viewing the state as a uniform actor we should look at the actions of its different agencies, which are sometimes in conflict with each other. Moreover, we must learn to look not just at states as lawmakers but also to focus on the significant lawmaking by non-state actors—arbitrators, institutions (so-called rule formulating agencies), multinational corporations, ethnic communities, and so on.²⁷⁰

The three themes that Ralf Michaels highlights resonate with a transnational approach to property: interdependent states, disaggregation, and lawmaking by non-state actors. First, while the state continues to exist and play a significant role in property regimes, a transnational approach to property would not be centered around national or international law that emanates from only the state and would recognize the influence of other states and localities in the formation of property regimes. Second, a disaggregated approach trains scholars to see the multiple levels of co-existing jurisdiction over land—local (which might be rural or urban or both), state, national, as well as executive, legislative, and judicial. More provocatively, appreciating the state as disaggregated also opens the possibility to see the conflicts of values in different fields of law that intersect with land—environmental, land use, human rights for example—as they play out through agency wars, judicial opinions, and conflicting social movements.

²⁷⁰ Ralf Michaels, *Transnationalizing Comparative Law*, 23 MAASTRICHT J. EUR. & COMP. L. 352, 355 (2016).

This lens also turns our attention to actors and processes for lawmaking beyond the state, recognizing that the state has a huge part, but acknowledging that law is also created through encounters between various actors. Sometimes these encounters are between states, but may also include individuals, colonizers, development consultants, arbitrators, investors, and corporations to name a few. Property regimes are a result of myriad encounters, failed and successful claims, relationships, evolutions, and transactions. This approach attempts to shift our focus from the already-existing property regimes to the genealogies of how such regimes came about, in particular how transnational encounters beyond the state shaped the formation of such regimes. In addition to reflecting how property is lived in the everyday sense, this broader perspective of property in transnational context also aligns with the reality of how norms are produced today through privatization, deregulation, and other forms of the ceding of public authority to private actors.²⁷¹ In this age of globalization and a financialized form of capitalism,²⁷² it seems even more essential to use legal analytic tools that reflect that reality.

In that sense, looking beyond the state opens our frame much wider than the relative neatness of (relatively formal) lawmaking by nonstate actors. It also brings an engagement with what might be considered “non-legal”²⁷³ —with the informal, the messy, the undefined, the slow and nonlinear processes of formalization, the extralegal, and the everyday discussed in the Section above. In other words, looking at the operations of property regimes beyond the state also underscores the necessity of engaging with lived experiences of property in trying to appreciate how regimes are established, operated, transformed, and which purposes they serve (e.g. how regimes actually govern property). From this perspective, it becomes fairly obvious that one’s analytical frame must embrace sociological, anthropological, political economic, and other accounts of property-related circumstances. (Without that expansion, how

²⁷¹ See Hall & Biersteker, *supra* note 215; Cutler, *supra* note 233.

²⁷² See GIOVANNI ARRIGHI, *THE LONG TWENTIETH CENTURY: MONEY, POWER, AND THE ORIGINS OF OUR TIMES* (1994); see also GRETA R. KRIPPNER, *CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE* (2011); COSTAS LAPAVITSAS, *PROFITING WITHOUT PRODUCING: HOW FINANCE EXPLOITS US ALL* (2014).

²⁷³ See Peter Zumbansen, *Transnational Legal Pluralism*, 1 *TRANSNAT’L LEGAL THEORY* 141, 145 (2010).

could one appreciate the legacy of the stretching of *terra nullius* on indigenous peoples and even in other circumstances around the world, or the significance of state sovereignty and democratic tensions in the system of investment-related arbitration as dispute resolution?) Despite the methodological shift in research²⁷⁴ and even judging²⁷⁵ of property regimes toward an interdisciplinary and ethnographic approach, orthodox property thought seems stuck in the transplantation of universal ideals for regime design across time and geography.

CONCLUSION: WHAT IS PROPERTY AND WHO GETS TO HAVE IT

This Article has attempted to show how common law property thought is a product of transnational encounters, and to offer several interdisciplinary ways of analyzing property law in transnational context. This orientation towards transnational examination would more squarely address how certain entrenched concepts in property law are used in different geographies and times in ways that perpetuate inequality through normalization of the status quo distributions of wealth. Several such concepts are discussed herein.

First, even, *what is considered property?*²⁷⁶ How did certain things come to be considered property and in more than one jurisdiction, no less? What does it mean for something to be ‘property’ in a legal sense? That is, how is the definition of property, in part, a reflection of encounters and ensuing legal regimes? Both the object of property and also the rights that attach can be appreciated more fully in transnational context.

Second, the justifications around what a property regime should promote (underlying the question of ‘why do societies have

²⁷⁴ See DARIAN-SMITH & McCARTY, *supra* note 222; Karen Knop, Ralf Michaels & Annelise Riles, *Transdisciplinary Conflict of Laws Foreword: Cavers's Double Legacy*, 71 L. & CONTEMP. PROBS. 1 (2008).

²⁷⁵ One could consider the Brandeis briefs as an early example of this phenomenon. For a more recent example, see ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW* (2011).

²⁷⁶ For American perspectives on what is considered property, see LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003); STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011).

property?')²⁷⁷ have played out in various circumstances where 'uses' of property were prioritized, as we saw above with conquest and colonialism. Justifications have varied over time and place—wealth production, agriculture, development, economic growth, marketability—and tell a powerful story of shifting priorities and underlying values in societies, as well as the circulation of those values and how they can be embedded in property regimes.

Closely related to these justifications for allocation of property and success of claims based on use are the *concepts such as progress*²⁷⁸ and *modernity*²⁷⁹ that have driven the development of certain aspects of property regimes. These concepts have different meanings and associations in different times and places. They are highly contingent upon their circumstances and they do different work in different places, and yet, some patterns emerge in how they are used to drive property regimes.

Once one attends to the *patterns* in the purposes that property serve—patterns that exist transnationally—it is possible to then draw connections between segments of populations in very different geographies. For example, the extensive government support in the United States for the building of suburbia post-War with resources for construction, real estate lending, as well as infrastructure such as roads and utilities were part of a larger narrative of progress and development that was meant to bring along certain kinds of citizens. This might be considered in connection with the rhetorical support for the middle class as progress for society with more recent discourse in India that celebrates the urban middle class as modern citizens. Both circumstances involve vast governmental resources that structure and support private industry and consumerism within powerful rhetorical values of national progress and entrance into world-stage of politics and geopolitical power, and that draw in citizens as dutiful consumers who through their (literal) buy-in, help move their country forward. The point here is not to universalize, but to

²⁷⁷ See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012) (providing an overview of the major, modern theories of property); ALEXANDER 1998, *supra* note 30.

²⁷⁸ See, e.g., Purdy 2007, *supra* note 64.

²⁷⁹ See, e.g., CHAKRABARTY, *supra* note 112.

see transnational flows of ideas and influence and to understand the pull of progress and modernity,²⁸⁰ in particular.

Finally, and again, the question of ‘*who gets to have it?*’ is affected by the jurisdictional border crossings of these notions. Ideas of use and modernity are closely related to who is a legitimate holder and user of property and to which lifestyles should be given space to operate. This much is clear from the discussion of indigenous people and their uses of land in the United States, Canada, and Australia, casting such populations and uses as not “modern” enough to justify their occupancy. It is also present in the vast webs of regulations that both explicitly and implicitly excluded black people and other racial minorities from homeownership in American suburbia when it was built²⁸¹ and through and after the Financial Crisis of 2008.²⁸² Much of the power of these situations resides in what is cast as ‘normal’ and as ‘desirable’. Slow shifts in what kinds of uses—and what kinds of occupants—are legitimate are not articulated as changes in law or precedent, but rather as obvious justifications not in need of further explanation. Superiority of race as well as caste, religion, and class, depending on the circumstance, gets embedded in judicial and societal discourse and passed on generationally.²⁸³

This method of analysis reveals the private accumulation of sovereignty through these processes. Not only would this be necessary for a case such as *Mabo*—directly within the context of conquest—but also for more mundane, seemingly local cases regarding land use, landlord-tenant law, or the like. With regards to the latter, the values that informed which claim should win (and in some sense which claim was more legitimate) might be less taken-for-granted if the power structures that shaped the applicable property regimes were recognized more explicitly.

We see through this analysis that the border-crossing operations of the notion of property and property regimes are not new, but

²⁸⁰ On the relationship between modernity and globalization, see ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996); ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991); FITZPATRICK 2002, *supra* note 35.

²⁸¹ See, e.g., FREUND, *supra* note 111; KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987).

²⁸² See, e.g., Gupta 2014, *supra* note 21.

²⁸³ See, e.g., WILLIAMS 2005, *supra* note 64.

rather, adopting a wider theoretical lens brings property law's often violent creation, usurpation and consolidation into sharper relief. Appreciating property in global context and as a process of transnationalization of law lends its own insights into how ideas around transnational property have been present for centuries. This implies that "transnational property," though not called that, has influenced the development of common law (as well as other forms of law) in a constitutive way from inception.